

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF YAVAPAI **FILED** 1 O'Clock M

3 STATE OF ARIZONA, )

4 Plaintiff, )

5 vs. )

6 STEVEN CARROLL DEMOCKER, )

7 Defendant. )

JAN 28 2010

JEANNE HICKS, Clerk  
BY WALTER RYAN  
Deputy

No. CR 2008-1339

8  
9  
10 BEFORE: THE HONORABLE THOMAS B. LINDBERG  
11 JUDGE OF THE SUPERIOR COURT  
12 DIVISION 6  
YAVAPAI COUNTY, ARIZONA

13 PRESCOTT, ARIZONA  
14 THURSDAY, JANUARY 14, 2010  
15 11:32 A.M. SESSION  
16 1:33 P.M. SESSION

17 REPORTER'S TRANSCRIPT ON PROCEEDINGS

18 Hearing on Motions

19 Motion To Preclude Testimony/Report of Richard Echols

20 Motion To Exclude Police Officers as Experts

21 Motion Re: Willits Instruction

22 Motion Re: Possible Modification of Release Conditions

23 Motion To Exclude Prior Act Evidence

24 LISA A. CHANEY, RPR, CSR, CR  
25 Certified Reporter  
Certificate No. 50801

ORIGINAL

LISA A. CHANEY, CR, RPR  
CERTIFIED REPORTER

January 14, 2010  
11:32 A.M.

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER, DEPUTY.  
ALSO PRESENT: MS. DEB COWELL, PARALEGAL.  
FOR THE DEFENDANT: MR. JOHN SEARS,  
MR. LARRY HAMMOND, AND MS. ANNE CHAPMAN.

(Sealed proceedings held in chambers,  
Page 1 through Page 34, and not included  
as a part of this transcript.)

THE COURT: We are in the courtroom.  
Mr. Butner is present for the State. All three defense  
counsel present, along with the Defendant Mr. DeMocker.  
The next matter I think we had talked about taking up  
would be the one that was Number 4 on Mr. Sears' list, the  
motion in limine to preclude testimony and report by  
Mr. Echols.

MR. SEARS: Thank you, Your Honor.  
Miss Chapman's going to speak to that motion.

MS. CHAPMAN: Your Honor, we had moved several  
times to exclude the report of Mr. Echols given that it  
was essentially focused on motive and not a report based  
on or about Mr. DeMocker's financial condition.

The State's response essentially acknowledges  
this and states that what they would like Mr. Echols to do  
is provide opinions on motive, and we think that, as we

1 outlined in the motions, is an improper subject for expert  
2 testimony, and also that Mr. Echols is not qualified to  
3 offer any opinions about motive given his training and  
4 background in accounting.

5 We also, Your Honor, think that there are  
6 additional reasons to exclude his testimony. One of those  
7 reasons is the State's failure to provide under Rule 15.1  
8 a list of the documents that Mr. Echols relied upon on his  
9 report or testimony.

10 The State provided us with a list of documents  
11 by name without including any Bates numbers and as we  
12 pointed out in the motion, the names of the document --  
13 the documents have been produced multiple times by  
14 multiple sources so we're not able to determine, even  
15 after Your Honor directed the State to provide us with  
16 this list, what documents Mr. Echols, in fact, relied  
17 upon.

18 He doesn't cite any of those documents in his  
19 report. So I think that's an independent reason to  
20 exclude him, and an additional reason, Your Honor, is that  
21 this testimony to the extent that it is relevant related  
22 to the F(12) aggravating factor which Your Honor now has  
23 stricken from the case and to the extent that it's no  
24 longer relevant, there is no reason to have testimony from  
25 Mr. Echols or for that matter Miss Wallace or anyone else

1 about these remaining financial matters that they no  
2 longer remain relevant.

3 And, Your Honor, I don't want to go through  
4 all of the examples in the motion but Mr. Echols' report  
5 provides opinions about speculating on the effect of a tax  
6 return, on the relationship between Mr. Kennedy and his --  
7 or excuse me -- Mr. DeMocker and Miss Kennedy, the set up  
8 of a confrontation between Mr. DeMocker and Miss Kennedy,  
9 that the relationship is, quote, very strained. He makes  
10 conclusions about correspondence between Mr. DeMocker and  
11 Miss Kennedy and describes it as significant and telling.  
12 He also offers opinions that Mr. DeMocker committed  
13 perjury and would be found guilty of committing perjury.  
14 Also opines that Mr. DeMocker would lose his license to  
15 sell securities and would lose everything.

16 These are not the opinions of an accountant  
17 and Mr. Echols is an accountant and to the extent that he  
18 is qualified to offer any opinion it would be with respect  
19 to financial information. A jury is capable of  
20 determining motive if Your Honor decides that this  
21 evidence remains. Motive remains relevant as the State  
22 argues to the question of motive. There's no reason to  
23 think that Mr. Echols as an accountant, is any more  
24 qualified than any member of the jury to make conclusions  
25 based on the evidence about the financial situation.

1 I also wanted to remind, Your Honor, and I  
2 think that you referenced it the other day that during the  
3 testimony of Mr. Curry during the Chronis Hearing  
4 Mr. Hammond asked Mr. Curry about whether from a financial  
5 forensic analysis standpoint he could make a determination  
6 about whether a reasonable objective person would think  
7 that a rational course would be to commit a homicide.  
8 Mr. Butner objected to that testimony and, you know,  
9 argued that it called for speculation and lack of  
10 foundation and Your Honor affirmed that objection and  
11 didn't permit Mr. Curry to testify.

12 At that time we pointed Your Honor to  
13 Mr. Echols' report the following, that he just comes right  
14 out of Page 4 of his report, that we feel the facts  
15 presented shows significant motive. So I think, Your  
16 Honor, to the extent that there is going to be testimony  
17 from Mr. Echols it should be limited, if at all, to  
18 information about the financial situation.

19 And, Your Honor, we also think that that  
20 testimony is no longer relevant given the fact that the  
21 F(12) has been struck from the case and we ask you to  
22 grant the motion to prohibit Mr. Echols from offering any  
23 opinion on motive or speculating about what the IRS might  
24 have done or legal conclusions or any other conclusions  
25 that are other than testimony about the financial

1 situation that Mr. DeMocker was in.

2 And, Your Honor, if you are inclined to allow  
3 Mr. Echols to continue to testify, we would also ask you  
4 order the State to comply with providing us with a list of  
5 Bates numbered documents that Mr. Echols relied on.

6 THE COURT: Thank you. Mr. Butner.

7 MR. BUTNER: Well, Judge, Mr. Echols is  
8 clearly highly qualified to testify about financial  
9 matters from a certified public accountant's point of view  
10 and a certified forensic examiner's point of view.

11 I'm not going to say that he didn't make  
12 observations that went beyond his field of expertise when  
13 he was on the witness stand in previous hearings. He did  
14 do that, but the State should not be precluded from  
15 bringing Mr. Echols to testify concerning the  
16 discrepancies in the financial affidavits filed by the  
17 Defendant in his divorce and the discrepancies in his tax  
18 return in 2007 because those items clearly demonstrate a  
19 financial motive for this homicide.

20 Mr. Echols analyzed all of those financial  
21 documents. He analyzed these bank account records. He  
22 looked at the e-mails going on between Mr. DeMocker and  
23 the victim in this case. He saw that there was an ongoing  
24 financial dispute and all of that is within the realm of  
25 his expertise as both a CPA and a certified financial or

1 fraud examiner.

2 Now, true, he went beyond that and, for  
3 example, saying that Mr. DeMocker committed perjury on the  
4 financial affidavits or would be found guilty of perjury,  
5 that's beyond his field of expertise, however, for him to  
6 testify that the figures that Mr. DeMocker was using were  
7 inaccurate, there's nothing wrong with that. That's  
8 absolutely within his field of expertise. He's in a  
9 position to analyze the income statements that were  
10 submitted to Mr. DeMocker by UBS and to see if he actually  
11 filed a tax return that complied with IRS regulations and  
12 federal law. And he also is in a position to offer an  
13 opinion as to whether the financial statements that were  
14 submitted by Mr. DeMocker to the Court were accurate and  
15 those are opinions that are within his field of expertise.

16 We're not going to seek to present testimony  
17 that would support the so-called F(12) or witness  
18 elimination aggravator. That is not what we're doing. We  
19 are going to submit testimony through Mr. Echols of motive  
20 in this case. This is a homicide that occurred as a  
21 result of a huge financial motive and in police reports,  
22 the last conversation that the victim had -- she was  
23 engaged in a conversation with her mother. In that  
24 conversation disclosed in police reports she indicated  
25 that she was going to have to talk to her lawyer and

1 possibly take the Defendant back to Court. That was what  
2 her mother said was the gist of that final conversation.

3           So the motive in this case is financial in  
4 nature and was evidenced by the e-mails and by all of  
5 these financial documents that were analyzed by Mr. Echols  
6 and his testimony. True, it should be confined to  
7 financial matters and as they are supported by the e-mails  
8 that he was able to analyze as a fraud examiner, but  
9 beyond that the State is not going to offer testimony  
10 concerning the relationship, so to speak, between  
11 Mr. DeMocker and Miss Kennedy. I believe that's it,  
12 Judge. I think that addresses --

13           THE COURT: Do you think that you are going to  
14 be able to control him sufficiently to keep him from  
15 offering opinions?

16           MR. BUTNER: Judge, I'm worried about that. I  
17 will tell you that. I am very concerned about that and  
18 believe it or not I did have a conversation with  
19 Mr. Echols about that before he took the stand in Court,  
20 but I'm in hopes that I will be able to stress upon him  
21 the importance of confining his testimony to factual  
22 matters that are within his field of expertise.

23           THE COURT: If you're allowed to continue to  
24 use Mr. Echols, do you see problems in the nature of the  
25 report that he has already -- has already provided --



1 MR. BUTNER: Yes, I do.

2 THE COURT: -- in terms of admitting that?

3 MR. BUTNER: Absolutely. I will tell the  
4 Court I will not be seeking to admit that report in the  
5 trial of this case. Mr. -- first of all, Mr. Echols'  
6 testimony is the best evidence in that regard but,  
7 secondly, he ranges a bit far afield, so to speak, for  
8 what the State is going to be using his testimony for and  
9 I would suggest that a lot of that goes toward the F(12)  
10 aggravator too and that, of course, is no longer part of  
11 that case.

12 THE COURT: Concerning Ms. Chapman and the  
13 defenses' concern for Bates number of the materials,  
14 apparently Mr. Echols and/or you gave them a list but the  
15 list may have less utility because of the lack of Bates  
16 numbers.

17 MR. BUTNER: You're killing me, you know. Let  
18 me explain what the problem is but we think that we worked  
19 our way around to fixing that problem.

20 The problem is that the sheriff's office  
21 submitted these documents directly to Mr. Echols and went  
22 -- sort of by-passed the county attorney's office. I  
23 mean, we have got the documents probably about the same  
24 time from the sheriff's office and then we --

25 THE COURT: So these copies didn't have Bates

1 number on them?

2 MR. BUTNER: Exactly. So what we're doing now  
3 is -- and I'm not sure that this is going to be make the  
4 defense very happy -- but we're going to gather up all  
5 these documents that were submitted to Mr. Echols and Bate  
6 stamp them in a whole new bunch, so to speak, and then  
7 give them to the defense in that fashion, rather than  
8 going back and trying to compare one by one. Is this, you  
9 know, equal to this, that kind of thing.

10 THE COURT: Well, at least they would have a  
11 clear idea of which ones they are and -- even if they're  
12 talking about the same documents that are marked in  
13 different fashion. All right. Thank you. Miss Chapman.

14 MS. CHAPMAN: Your Honor, it sounds like there  
15 are several points of agreement between us about what the  
16 limitation should be if he should be permitted to testify  
17 at all. I'm not sure that if his testimony is going to be  
18 limited to the financial information.

19 I would still make the -- take the position  
20 that it doesn't -- it's no longer relevant given the  
21 absence of the F(12) aggravator but to the extent that it  
22 remains relevant, I think that even keeping him away from  
23 making conclusions about the perfect storm brewing or that  
24 it was -- the incentive is going to be important because  
25 these things aren't even -- I mean, this is what the

1 response was from the State and that is that he's  
2 qualified to offer those kinds of opinions and I don't  
3 think he is.

4           And I think what Mr. Butner just said is  
5 consistent with the belief that he's not but, again, we  
6 don't want to be in a position of having him say whatever  
7 he's going to say on the stand and then backing away from  
8 that, that's not going to be helpful for us and I don't  
9 think that you can undue -- undue any harm that he might  
10 do by doing that. So I'm not sure as to what extent  
11 Mr. Butner can exercise control over him given what we've  
12 seen before, but we think that's the significant concern  
13 that remains.

14           THE COURT: Thank you. Mr. Echols and other  
15 witnesses that have testified before the Court have  
16 backgrounds in accounting. Mr. Echols in particular with  
17 bachelor's degree in accounting, certified public  
18 accountant, certified financial forensic, and certified  
19 fraud examiner with experience in those fields but -- and  
20 so in terms of general qualifications of being able to  
21 testify fully and accurately in regard to questions of  
22 financial condition, I think he's an appropriate qualified  
23 expert witness in those kinds of fields; accounting,  
24 financial examination, and valuation, fraud examination  
25 and evaluation.

1           Clearly, he's not an expert in terms of the  
2 psychology, psychiatry, things that have to do with  
3 motivation. It's an argument that the State can make that  
4 there was some financial motivation for the killing of  
5 Miss Kennedy but the witness is not the one to make that  
6 argument, and I have concerns as I've shared with you  
7 about volunteered information from any witness, in  
8 particular an expert witness, in particular Mr. Echols  
9 with regard to some of what I think counsel referred to as  
10 hyperbole or exaggerated statements with regard to  
11 motivation by Miss Kennedy, Miss Kennedy's accountant,  
12 what the police might do, what the Court might do, what  
13 anybody might do as a result of the allegations that are  
14 made concerning the financial conditions. So he's not an  
15 expert in terms of human motivation or psychology.

16           I'm going to preclude him from testifying with  
17 regard to those sorts of opinions. He's limited to  
18 testimony with regard to accounting and auditing and fraud  
19 examination. The ramifications of that are for attorneys  
20 to argue about, not for the -- witness experts are not to  
21 hypothesize about.

22           So I don't think that his testimony is totally  
23 irrelevant as a result of the Court striking the F(12)  
24 aggravator that had to do with, I guess, what people  
25 commonly might call witness elimination but I think

1 because motive may be relevant in a homicide case, then  
2 financial condition that bears on that motive may  
3 establish some kind of financial or pecuniary motive is  
4 still legitimately admissible. The State has indicated  
5 that it won't try to seek to admit the report that was  
6 filed.

7 I'm not saying that it might not be valuable  
8 for cross-examination purposes because it may or for  
9 examination purposes because it may. Having a copy marked  
10 but not admitted or at least admitted in full, it may be  
11 appropriate -- it may be appropriate to even admit a copy  
12 if the defense seeks it for impeachment purposes or the  
13 State may. So long as it's appropriately redacted and  
14 doesn't have clearly offensive information where there's  
15 some opinion that's being asserted that is outside the  
16 area of expertise by Mr. Echols.

17 I will direct the State provide the Bates  
18 number of the materials from Mr. Echols. When can that be  
19 accomplished by?

20 MR. BUTNER: Judge, and when you say provide  
21 the Bates numbers, can we get these new materials together  
22 --

23 THE COURT: I don't care which way you do it.

24 MR. BUTNER: Okay.

25 THE COURT: You can do it in a fashion that

1 identifies existing Bates numbers. I expect that would be  
2 preferable. I think there is simply no realistic way of  
3 doing that.

4 MR. BUTNER: We've been working on this  
5 already and we believe that we will be able to provide  
6 that information to the defense by the end of next week.

7 THE COURT: So ordered.

8 MR. BUTNER: Thank you.

9 THE COURT: So I won't -- I suppose this is  
10 granted it in part and denying it in part. I won't bar  
11 the State from using Mr. Echols or other qualified  
12 financial expert satisfactorily disclosed. I think right  
13 now we're left with Mr. Echols. So you can use such a  
14 qualified forensic accountant as part of your case to  
15 attempt to establish some financial motive.

16 Mr. Butner, he is not allowed to testify  
17 concerning things outside the financial area of expertise,  
18 in particular, to attribute motive to try to ascertain  
19 what Miss Kennedy may have been thinking, what  
20 Mr. DeMocker may have been thinking, and that sort of  
21 thing. And I will direct you to caution him that he is to  
22 remain within his field of expertise on penalties. If he  
23 comes to Court, and he does not --

24 MS. CHAPMAN: Your Honor, just a point of  
25 clarification, would that include from precluding him from

1 offering any testimony about potential consequences of the  
2 IRS or security investigation into Mr. DeMocker's  
3 licensing and other matters related to the consequences of  
4 --

5 THE COURT: I guess, I'm not sure of what his  
6 qualifications are for his establishing that based on my  
7 present recollection what he testified to. If he's -- if  
8 he's qualified, I think that there needs to be some  
9 foundation laid and I'm not sure at this point that I  
10 recall there was substantial foundation laid as to what  
11 the IRS might do.

12 I recall there being testimony but I'm not  
13 remembering if some of it came from Mr. Curry versus  
14 Mr. Echols about what would happen. And as far as  
15 licensing it seems to me that that becomes rather  
16 speculative.

17 Mr. Butner, do you have --

18 MR. BUTNER: Judge, I think he's clearly  
19 testified to -- testified about the potential consequences  
20 in regard to the IRS. I did not lay any foundation in  
21 regard to whether he was qualified to testify concerning  
22 consequences of licensure for the Defendant in terms of  
23 dealing in securities and so I would certainly be required  
24 to do that if he were to offer any such opinion.

25 THE COURT: I think we need to know if you are

1 going to offer, you know, the defense in particular more  
2 so than me, as to whether you're going to use him to make  
3 such an assertion.

4 MR. BUTNER: I don't know at this point in  
5 time that I will be doing that. If I intend to do that I  
6 will make sure that I provide the defense with his  
7 qualifications to do that kind of -- to provide that kind  
8 of testimony. At this point in time I'm not aware of any  
9 and I'm not aware of foundation for him to testify  
10 about --

11 THE COURT: So you think it is unlikely based  
12 on what you know about his qualifications?

13 MR. BUTNER: That's correct.

14 MS. CHAPMAN: And, Your Honor, the only thing  
15 I would add with respect to the consequences of the IRS,  
16 that was specifically related to the F(12) aggravator and  
17 I think that with the elimination of the colloquial  
18 witness killing aggravator it is no longer relevant what  
19 the IRS may or may not have done if things that didn't  
20 happen, may or may not have happened, which is where we're  
21 left with what he might have to say about that issue.

22 MR. BUTNER: Judge, I would respectfully  
23 disagree with that. The consequences with the IRS are  
24 very, very likely to be pecuniary in nature and would not  
25 be sustainable by the Defendant based upon the evidence



1 that we've already been presented. It could reek havoc in  
2 his life financially and possibly other ways.

3 THE COURT: Do you have other witnesses apart  
4 from Mr. Echols to identify what the consequences would be  
5 because at this point the consequences of the disagreement  
6 over some of these items and the prefiling of the income  
7 tax return based on the evidence that has been presented  
8 is there may be some penalties and requirements but the  
9 penalties and requirements are of a pretty insignificant  
10 nature based on what I heard at the earlier timeframes.

11 MR. BUTNER: At this point in time, Your  
12 Honor, the other potential witnesses on this subject would  
13 be Mr. Casalena and possibly the Defendant's accountant,  
14 Mr. Raider, but I understand the Court may view those  
15 financial consequences to be minimal or inconsequential  
16 but if somebody is running a substantial negative on a  
17 monthly basis any kind of financial consequences  
18 whatsoever would likely be significant. And I'm, quite  
19 frankly, not sufficiently knowledgeable about that at this  
20 moment in time to say anything more than that, Judge.

21 THE COURT: I think that it's -- I think that  
22 it's doubtful that I'll allow that kind of testimony but I  
23 think we'll need to address that as we get closer but I  
24 think that it's doubtful that I would allow it from that  
25 standpoint.

1 I think that I'm more along the lines of  
2 what's being argued by the defense in this case at least  
3 because based on the testimony that I have heard already,  
4 the dispute from the IRS perspective is likely to not  
5 result in much, if any, sanction at all.

6 And I'm not, you know, I'm not saying that  
7 Mr. Echols may not be qualified to testify as to that but  
8 I didn't hear any qualifications as to the State  
9 acknowledging its ability to opine what that might mean  
10 for a security's license.

11 Mr. Sears.

12 MR. SEARS: Thank you. I see we have a minute  
13 or two here. We had mentioned at the time that  
14 Mr. Hammond was talking to you about the DNA issues that  
15 we thought it was quite likely that we would need sometime  
16 with you in the future to talk about those issues and  
17 today we've been given -- in advance of a formal  
18 disclosure the State has given us the first scientific  
19 examination report from the DPS crime lab regarding the --  
20 what we've been calling the 15 items and this shows that  
21 they received them and they've analyzed a number of them  
22 simply to detect the presence of biological material and  
23 they haven't then gone to the next phase of what they're  
24 going to do.

25 So that makes us pretty certain now that we

1 will need that time and I brought my calendar and if this  
2 isn't the moment to do that, if we can do it before we're  
3 done here this week, I'd ask that you try and find some  
4 time for us and we're ready to do that whenever you are.

5 THE COURT: In what general timeframe?

6 MR. SEARS: This is my 2010 calendar, Your  
7 Honor.

8 THE COURT: This week, next week, the week  
9 following?

10 MS. CHAPMAN: I think it's going to be longer  
11 than that because we're going to need to see what kind of  
12 progress is made. I mean, we're expecting another report,  
13 I would anticipate, before we would be at a place where we  
14 would want to come back before you.

15 And, Your Honor, it might make sense at the  
16 same time to set some time aside to do argument on the  
17 obvious motion that we had promised you. So I don't know  
18 if we can do it late February, early March, part of that's  
19 going to depend on DPS.

20 MR. SEARS: We're also making excellent  
21 progress directly to arrange and schedule the testings  
22 we've told you so much about at our laboratory of some of  
23 these items. We're down to the exchanging of contact  
24 information, that seems to be on the verge of happening.

25 THE COURT: All right. So maybe I can get

1 with you on timeframe in late February or early March as  
2 Miss Chapman was suggesting. I start a -- what is  
3 currently set for a three week trial the 4th of February,  
4 I think. So I'm running a little low on time.

5 MR. SEARS: So we understand, Your Honor. The  
6 other thing is, is I wonder if you could inquire of the  
7 State whether they received any feedback from the  
8 sheriff's office regarding your orders about  
9 accommodations in the jail, and the reason is is that  
10 we've already started what looks like it's going to be a  
11 pretty complicated process of getting together the  
12 computer and the data, and we're full speed ahead on that  
13 unless there's a reason to hold up for a minute.

14 THE COURT: Mr. Butner, can you speak to that?

15 MR. BUTNER: I, you know, to a limited extent.  
16 And, quite frankly, maybe at the lunch hour I'll be able  
17 to find out more clearly what the sheriff's position is,  
18 but the biggest problem I will tell the Court is the  
19 secure line to this room for the Defendant and, quite  
20 frankly, the sheriff's office said that we cannot -- we  
21 cannot and won't do that, and they're ready to come down  
22 to Court with Mr. Fields from our office and explain to  
23 the Court why that can't be done.

24 And I, you know, I don't want to speak to the  
25 other things because I'm not real clear on those other

1 things but I don't think they are a major problem. I just  
2 think that that secure phone line is a big issue.

3 THE COURT: That was the part of the order  
4 that I signed that actually invited some additional  
5 discussions.

6 MR. BUTNER: I realize that, Judge. And you  
7 know, sometimes when you deal with the law enforcement  
8 agency they have short of a visceral reaction sometimes to  
9 certain things but I think they now have a better  
10 understanding that that was, in essence, a question,  
11 please respond, let us know.

12 THE COURT: It wasn't a determination that's  
13 been made yet. I recognize that I have some issues with  
14 regard to -- with necessary contact between attorney and  
15 client sixth amendment protected and Arizona constitution  
16 protected also, but I recognize security concerns also may  
17 be implicated by having totally free available line for  
18 hours at a time, so -- where calls might be made to some  
19 person or persons other than attorneys.

20 MR. BUTNER: Right.

21 THE COURT: So maybe we need to -- all of us  
22 need to discuss that you, me, Mr. Sears, and any  
23 representatives that wish to avail themselves of the  
24 opportunity, detention staff.

25 MR. BUTNER: Should we try and do that

1     sometime this afternoon?

2                 THE COURT: I wouldn't mind.

3                 MR. BUTNER: Okay. I'll try and round them up  
4     and be in a position to do that. What time would you  
5     suggestion, Judge?

6                 THE COURT: Oh, I know we still have some  
7     things to talk about before then, but maybe 3.

8                 MR. BUTNER: Okay.

9                 THE COURT: Does that make sense?

10                MR. SEARS: That will work.

11                THE COURT: Okay. Other things, Mr. Sears?

12                MR. SEARS: No, Your Honor. Thank you.

13                THE COURT: We'll stand in recess then. 1:30,  
14     Mr. Sears?

15                MR. SEARS: Yes, Your Honor.

16                MR. BUTNER: Thank you, sir.

17                (Whereupon the noon recess was taken.)  
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January 14, 2010  
1:33 p.m.

Hearing on Motions (Cont'd)

THE COURT: Continuing on in the State versus Steven DeMocker matter. Mr. Hammond is not with us but otherwise defense counsel are here. Mr. Butner is here for the State. Mr. Sears.

MR. SEARS: Thank you, Judge. We have filed with your clerk the stipulation signed by me and Mr. Butner regarding the chain of custody matter. I didn't prepare an order. I wasn't sure if it required your approval.

THE COURT: If and when we get to the trial, at some point you're going to want me to read the stipulation?

MR. SEARS: You or the clerk, yeah, that would be fine.

THE COURT: Okay. I appreciate that.

MR. SEARS: Thank you, Your Honor. Judge, if we could perhaps go back on our list to Number 3, the police officers as experts matter, and hear from Ms. Chapman. Trying to close that --

THE COURT: Okay.

MR. SEARS: -- if she will.

1 MS. CHAPMAN: Your Honor, I had provided a  
2 list to Mr. Butner which I can also hand up to the Court  
3 of different officers in the areas of testimony to which  
4 we were objecting.

5 Your Honor had inquired about various areas  
6 and I'm not sure if Mr. Butner has any to add to that or  
7 other areas of concern but those are the specific  
8 witnesses and the specific areas about which they  
9 previously testified that we think are problematic and  
10 fall under the category of the kinds of testimony that are  
11 properly the subject of expert testimony and not properly  
12 the subject of lay testimony as proposed by the State.

13 THE COURT: Mr. Butner, do you -- I mean, do  
14 you and Ms. Chapman want to go through each of these?

15 MR. BUTNER: I think that would be a really  
16 good idea, Judge, as a matter of fact.

17 THE COURT: Okay. Let me see where your areas  
18 are for agreement and disagreement. So why don't you just  
19 start with the areas of agreement, and then we can go on  
20 to any disagreements.

21 MR. BUTNER: Okay. In terms of the forensic  
22 pathology we drop down to that point under Detective  
23 McDormett.

24 THE COURT: Okay.

25 MR. BUTNER: The force of the blows to



1 Miss Kennedy and the direction of the blows were made by  
2 the attacker. I see that that's GJ. I assume that that's  
3 grand jury transcript numbers and I don't think that it's  
4 appropriate for Detective McDormett to be testifying as to  
5 the force of the blows, other than to state in certain  
6 instances the obvious, that being that if he's in  
7 attendance or has seen autopsy pictures and he's asked an  
8 appropriate question, the blows fractured her skull. The  
9 directions of the blows, I don't think that's appropriate.  
10 He's not an expert on that stuff.

11 Psychology, I don't see that he can opine that  
12 this was done in an act of rage, or that Miss Kennedy was  
13 attempting to reason with her attacker, or that  
14 Mr. DeMocker's response was odd, or Mr. DeMocker's alleged  
15 tax fraud. I don't think that that's appropriate.

16 Yeah, I guess, that he's not really an expert  
17 on whether a golf club would be intact. Although that  
18 strikes me as -- no pun intended -- strikes me as maybe  
19 that's the sort of thing that a lay witness could say.  
20 Since it's our theory, of course, is that it's a steal  
21 head wood type of club which it seems to me that that's  
22 sort of a matter of common sense, but --

23 THE COURT: Therefore, do we need his  
24 testimony with regard to that?

25 MR. BUTNER: We don't need it. I agree,

1 Judge. It's not one of those kinds of things that is  
2 needed really.

3 MS. CHAPMAN: Your Honor, if I might -- I  
4 mean, one of the grand jurors asked whether a golf club  
5 could sustain that kind of force and that's what this was  
6 in response to. I don't think there's been some --

7 THE COURT: And the officer said yes or  
8 something like that.

9 MS. CHAPMAN: He said that he had done some  
10 golf or had other people that were golfers and that he had  
11 asked them and they had said, yes, but I don't think there  
12 is any evidence that's been disclosed to us about what  
13 kind of shaft was on this alleged golf club.

14 So I'm not sure that offering any opinions  
15 about what kind of golf club it was and what may or may  
16 not have happened to the golf club, that may or may not be  
17 the murder weapon, would be appropriate by any witness.

18 THE COURT: I don't disagree. I think that --  
19 I don't think his testimony is necessary with regard to  
20 speculating about whether the golf club would or would not  
21 be intact. I think that's argument.

22 MS. CHAPMAN: Can we go back up to -- under  
23 the psychology that the rage is suggestive of a  
24 relationship. I assume that that's also an area where we  
25 could agree that he wouldn't be offering.

1 MR. BUTNER: Yeah, the whole psychology thing  
2 right there.

3 MS. CHAPMAN: I just wanted --

4 MR. BUTNER: I want to clarify, I'm not  
5 opposed to that.

6 THE COURT: Okay. We may have some  
7 disagreement then on evaluation of the crime scene  
8 including blood splatter and bike tires and that sort of  
9 thing?

10 MR. BUTNER: Right.

11 THE COURT: Okay.

12 MR. BUTNER: I might --

13 THE COURT: Let me hold on that for a moment.

14 MR. BUTNER: Okay.

15 THE COURT: Keep on going with where you agree  
16 where there's no need for additional hearings.

17 MR. BUTNER: Looking at Doug Brown's testimony  
18 he was testifying at a time when we didn't put experts on  
19 the stand and he was, in essence, parroting lab reports.

20 THE COURT: Yeah, for grand jury purposes.

21 MR. BUTNER: Yeah.

22 THE COURT: You're not intending to call him  
23 to talk about in any expert way DNA?

24 MR. BUTNER: Exactly, I'm not.

25 THE COURT: I didn't assume that you were.

1 MR. BUTNER: But if he asks -- if somebody  
2 asks him that question, not me, okay, if somebody asks him  
3 that question, I would fully expect him to report  
4 accurately what the lab report say. I had heard that  
5 maybe you wanted to say something.

6 MS. CHAPMAN: Well, Your Honor, just with  
7 respect to this question at the top of Page 2 about, I  
8 can't say that for sure because of the inclusive results.  
9 I think that relates in particular to the DNA motion and  
10 maybe it's better taken up at the time that we address  
11 those issues because we're still receiving lab reports.  
12 So I don't think that that's an accurate characterization  
13 of what has been received then or what's received now.

14 THE COURT: I've heard that this morning.

15 MS. CHAPMAN: So we'll take that up at a later  
16 time.

17 THE COURT: Well, from what I'm hearing from  
18 Mr. Butner is he doesn't have a disagreement with you that  
19 Brown is not an expert on DNA and so his testimony would  
20 be limited and depends on what the question is asked but  
21 not inclusive of being presented as an expert on DNA.

22 MS. CHAPMAN: Okay.

23 THE COURT: It may relate to what else he did.

24 MS. CHAPMAN: Yeah.

25 THE COURT: And then only if he's asked about

1 that, it seems to me.

2 MR. BUTNER: For example, I have -- just to  
3 clarify, if Detective Brown is on the stand after one of  
4 the lab witnesses has taken the stand and testified about  
5 the nature of the DNA results, then if it somehow comes  
6 up, you know, what's your understanding, Detective Brown,  
7 of the results in this case.

8 I would hope that he would testify truthfully  
9 and say, you know, well, I think that they were  
10 inconclusive about this or, you know, we had DNA profile  
11 underneath her fingernails about that.

12 THE COURT: I expect he won't be asked that  
13 but he -- seems to me he can answer honestly if he is  
14 asked about it and -- but I don't anticipate that.

15 MS. CHAPMAN: Again, I think that -- I mean,  
16 this question is closely related to the DNA motion, but  
17 essentially the question about DNA and Mr. DeMocker's DNA  
18 fingerprints not being found at Miss Kennedy's house.

19 The only honest answer to that is, no, they  
20 weren't and so this -- I can't say that for sure because  
21 of the inconclusive results -- to me suggests that he's  
22 interpreting DNA reports that he -- that don't say that.  
23 They don't say they're inconclusive with respect to  
24 whether they found prints or DNA of Mr. DeMocker at  
25 Miss Kennedy's house. That's --

1           THE COURT: I think that people will have to  
2 watch how they phrase questions but I think that the  
3 nature of grand jury testimony is different than the  
4 nature of trial testimony because of the acceptance of  
5 hearsay and other information in the grand jury that's not  
6 acceptable in trial presentation. I think that I  
7 addressed the, appeared identical appearance, already.

8           MR. BUTNER: Judge, I would like to readdress  
9 that if we could. I don't know if now this moment is the  
10 time.

11          THE COURT: I recognize that you have some  
12 disagreements so let's hold that for now and go on to  
13 wherever you have some agreements.

14          MR. BUTNER: Forensic pathology. Well, let's  
15 see --

16          THE COURT: That information you're expecting  
17 to come out of Dr. Keen?

18          MR. BUTNER: Yeah, basically, I am. It says  
19 the Chronis hearing. Well, yeah, it came out from the  
20 Chronis hearing and basically came from Dr. Keen.

21          MS. CHAPMAN: There was also testimony from  
22 Officer Brown. I cited to the specific places in the  
23 motion but if we don't expect to hear from Brown about  
24 these issues, then I don't think it's an issue, but if we  
25 do, then we should talk about it.

1 MR. BUTNER: So basically you're saying not  
2 just Detective Brown or --

3 MS. CHAPMAN: I'm saying any.

4 THE COURT: Not police officers who are not  
5 qualified forensic pathologists I think is what the  
6 defense is saying.

7 (Mr. Sears exits the courtroom.)

8 MR. BUTNER: Judge, it seems to me if we have  
9 the testimony already before the tribunal at trial from  
10 Dr. Keen then at some point in time I think when a  
11 detective is investigating a case he's going to be relying  
12 upon that and it may come up that he will say, well, I  
13 thought that wounds were defensive in nature. I was  
14 looking for something as a result of that.

15 I'm just grasping here, but the point being  
16 that he will not initially testify to these kinds of facts  
17 as an expert, rather, he will testify to these kinds of  
18 facts having relied upon them from an expert, that expert  
19 being Dr. Keen.

20 THE COURT: Well, in general, witnesses aren't  
21 allowed to recapitulate the testimony of other witnesses  
22 and I concede that there may be some fashion in which  
23 there becomes some relevancy to relying on what somebody  
24 else says but -- so in general I'm going to bar you from  
25 doing that but I'll also expect there to be a proper

1 objection if you think he's gone overboard on that.

2 MR. BUTNER: I'm not going to try and backdoor  
3 that evidence in with a detective rather than an expert  
4 such as Dr. Keen.

5 THE COURT: Understood.

6 MS. CHAPMAN: And I think we're in general  
7 agreement. We can make the objection but there's no  
8 reason for him to then repeat that's also his conclusion  
9 but I think that we're agreeing that that's not what's  
10 going to happen.

11 THE COURT: Right. Right. I agree with that.

12 MS. CHAPMAN: Okay.

13 THE COURT: The fact that a lay witness agrees  
14 with an expert isn't admissible.

15 MR. BUTNER: Okay. Blood splatter. There's  
16 --

17 THE COURT: Well, that's an area where you and  
18 she disagree?

19 MR. BUTNER: Yeah, I guess so, I'll just leave  
20 it at that.

21 THE COURT: Okay.

22 MR. BUTNER: And I disagree on staged. We  
23 don't have evidence at this point in time that  
24 Mr. DeMocker was hiding money.

25 THE COURT: So you're in general agreement?



1 MR. BUTNER: Right.

2 THE COURT: Winslow, again, we talked about  
3 that already and I'll let you talk about it some more.

4 MR. BUTNER: Okay. Thank you.

5 THE COURT: Teresa Kennedy.

6 MS. CHAPMAN: This comes out of an interview.

7 THE COURT: This is -- I think probably we  
8 need to go over the rest of what you've already talked  
9 about and hear from you the areas that you have some  
10 disagreements on.

11 I don't know if you wanted to say more about  
12 the specific other things that Mr. Butner has not agreed  
13 with you on, Miss Chapman. So if you do we can do it that  
14 way, if you want to have Mr. Butner go first and then you  
15 respond that way, whichever way.

16 MS. CHAPMAN: I'm fine with having Mr. Butner  
17 discuss the areas that we have disagreement on. I did --  
18 with respect to Detective Page it indicates that it's  
19 expert testimony or testimony about forensic computer  
20 examination will be offered from him or is that an open  
21 issue?

22 MR. BUTNER: That's an open issue.

23 MS. CHAPMAN: Okay.

24 THE COURT: Well, let's go through the open  
25 issues or the ones with which you disagree with defense.

1 MR. BUTNER: Okay. Thanks, Judge. Concerning  
2 Detective Page we've had testimony about the specialized  
3 training that Detective Page has had. He's had  
4 specialized education in this regard and he's been  
5 continuing to educate himself during the pendency of this  
6 case, quite frankly.

7 And I believe that as a result of that  
8 specialized training that when he takes the witness stand  
9 he will have knowledge, skill, and experience as well as  
10 training and education which will enable him to offer  
11 certain opinions about the forensic computer information  
12 that he has garnered during the course of his  
13 investigative efforts.

14 That isn't to say that we're going to offer  
15 him as an expert, for example, on how the computer was  
16 handled in the sheriff's office. You know, there's this  
17 dispute about it going on and going off and that kind of  
18 thing. He's not going to be testifying about that stuff.  
19 He's not an expert in that regard but he has become an  
20 expert in terms of retrieving information from the  
21 computer. He has specialized training in this program,  
22 the M Case Program, and so he is now able to do that as a  
23 qualified expert.

24 MS. CHAPMAN: Well -- -

25 THE COURT: Miss Chapman.

1 MS. CHAPMAN: -- Your Honor, he hasn't been  
2 disclosed as an expert and as late as January 4th he was  
3 not represented to us as an expert. His testimony at the  
4 Chronis hearing was that he had had two courses on -- from  
5 the National White Collar Crime Center and that's the  
6 extent of any disclosure we've been provided with about  
7 any qualifications he has and, frankly, I don't think that  
8 he's qualified.

9 If we're talking about him now as an expert  
10 issue, I guess, there would be further questions about how  
11 foundation for that would be laid but he's -- like I said,  
12 as of the 4th he wasn't disclosed as an expert, not held  
13 out as one, nor is his testimony at the Chronis hearing  
14 consistent with him being an expert in any area of  
15 forensic examination and there is a live dispute about how  
16 that examination took place and what happened during the  
17 course of the investigation.

18 THE COURT: Is he not disclosed as an expert,  
19 Mr. Butner?

20 MR. BUTNER: I was just checking on that. I  
21 thought he had been and it was my understanding that when  
22 he took the stand in the Chronis hearing that he was  
23 qualified to some extent in terms of his education,  
24 training, and experience as an expert.

25 MS. CHAPMAN: Your Honor, I have the 44th

1 supplemental disclosure which is the latest disclosure  
2 with the listing of experts. I can hand it to Your Honor  
3 and Mr. Butner.

4 THE COURT: No. I'll take your vow, counsel.

5 MR. BUTNER: I believe that.

6 MS. CHAPMAN: He's not included.

7 THE COURT: One of the hazard of using forms I  
8 expect but --

9 MR. BUTNER: Well, we need to do that, Judge,  
10 at this point in time.

11 THE COURT: Well, I guess I may need to have  
12 some additional foundation laid. I don't recall, you  
13 know, to some extent -- we had a lot of testimony through  
14 Detective Page at the time of the Chronis hearing but I  
15 don't recall whether he was offered as an expert or not  
16 offered as an expert at that time or to what degree he has  
17 any expertise.

18 It's -- that's a real important issue as to  
19 whether the State is going to try to use him as an expert  
20 or somebody else, or the defense is going to try to use an  
21 expert in terms of forensic computer examinations.

22 So, I guess, I'll say this, without a prior  
23 disclosure and without a hearing outside the presence of  
24 the jury, and my preference, perhaps at the next set of  
25 hearings we have, since I still have some DNA hearings

1 left.

2 (Mr. Sears entered the courtroom.)

3 THE COURT: I don't think Mr. Page is going to  
4 be able to testify with regard to forensic examinations.

5 MR. BUTNER: We'll make sure that we bring  
6 him, Judge, next time, if we intend to pursue that. Thank  
7 you.

8 MS. CHAPMAN: And, Your Honor, we will, just  
9 for the record, preserve our objection to the potential  
10 disclosure and we will deal with that at the time.

11 THE COURT: Exactly. Thank you. Do you  
12 propose, Mr. Butner, to use Mr. McDormett -- Detective  
13 McDormett to testify about using such words as staged and  
14 repositioned and blood splatter and comparisons with --  
15 between bikes and tires?

16 MR. BUTNER: To a limited extent, and if I  
17 could explain.

18 THE COURT: Go ahead.

19 MR. BUTNER: Probably the best example is the  
20 blood splatter where we have the one bookcase where blood  
21 is on the side of the bookcase and has dripped straight  
22 down and dried, and then blood has dripped basically at a  
23 perpendicular angle to that drip, that caused the  
24 detective to conclude that the scene had been staged to  
25 make it look like it was a fall.

1 I think that that's -- I think that's a  
2 reasonable detective-type conclusion that does not require  
3 him to be an expert on blood splatter. Similarly, and I'm  
4 not saying directions of blow when I describe this, but  
5 similarly the victim's head is in close proximity to a  
6 portion of the desk and there's a splash of blood on the  
7 side of the desk, down low near the floor. That's kind of  
8 a common sense determination that the victim's head was in  
9 close proximity to the desk at the time that the blow was  
10 struck.

11 (Mr. Hammond enters the courtroom.)

12 MR. BUTNER: You can't say -- I don't expect  
13 him to be able to say from what direction or anything like  
14 that but that's a common sense observation. Similarly  
15 with the body being repositioned, the body is over a pool  
16 of blood on the carpet, rather, you know, say, about a one  
17 foot by two foot pool of blood, if I can accurately  
18 determine the size from the photographs, but that pool is  
19 underneath the abdomen area of the victim and there are no  
20 wounds whatsoever in the abdomen area of the victim. All  
21 of the wounds, in essence, are about the head, so to  
22 speak. That is a common sense sort of a conclusion that  
23 the body had been repositioned.

24 And then the bike tire impression comparisons  
25 that's, of course, something that, you know, we're

1 debating at length. If you wish for me to discuss that at  
2 this time I will, but I think that it probably fits better  
3 with others and actually Detective McDormett isn't the  
4 person to be testifying about bike tire impressions.

5 THE COURT: To the extent he testified at the  
6 grand jury was with respect to what other people had  
7 observed?

8 MR. BUTNER: That's my understanding, Judge.  
9 I don't have a clear recollection of that but I certainly  
10 would not be calling him to testify about bike tire  
11 impressions. He wasn't there.

12 THE COURT: Okay. Let's stay on McDormett and  
13 go back to Miss Chapman and record can reflect that  
14 Mr. Hammond has returned and joined us.

15 Ms. Chapman.

16 MS. CHAPMAN: Certainly, Your Honor, with  
17 respect to the blood splatter the State has disclosed an  
18 expert with respect to blood splatter. Detective  
19 McDormett has not been so disclosed as an expert. He  
20 doesn't have training or qualification about blood  
21 splatter or crime scene reconstruction.

22 I understand that Mr. Butner may think that  
23 it's a matter of common sense, Your Honor, but there are  
24 protocols about what can be derived or determined from  
25 blood splatter that have to do with the speed at which

1 blood dries and other complicated things that are well  
2 beyond my level of expertise and also, frankly, beyond the  
3 level of expertise of Detective McDormett.

4           Given that the State as a disclosed expert in  
5 this area and given that conclusions about blood splatter  
6 require the kind of scientific, technical, or specialized  
7 knowledge that's controlled by 702, I don't think it's  
8 appropriate for either McDormett or Officer Brown to  
9 testify about blood splatter.

10           The same thing with regard to the question of  
11 the scene being staged. Again, there's been no disclosure  
12 to us about McDormett or Brown's training in this area or  
13 identifying either of them as experts. What they  
14 testified to in the grand jury was that the body had been  
15 moved, that the crime scene had been staged, and they  
16 spoke about different items at the crime scene that they  
17 based those conclusions on.

18           And again, Your Honor, that is also an area as  
19 to whether or not the scene was staged or when things were  
20 moved, or how they were moved, or whether they were moved  
21 at all, and how you make those kinds of determinations  
22 based on measurements and analysis of the location of  
23 items in the room and the timing of when things were moved  
24 or not moved, I think is beyond common experience and to  
25 the extent it's not -- they can describe what they saw and



1 the jurors can draw their own conclusions which is what is  
2 appropriate under 701.

3 THE COURT: Well, McDormett has more training  
4 than the laymen does in this regard in terms of  
5 investigation of crime.

6 MS. CHAPMAN: Your Honor --

7 THE COURT: And I find that he's not an expert  
8 with regard to blood splatter or with regard to  
9 reconstruction of crime scenes. Descriptions of what were  
10 observed by a percipient witness as I indicated are  
11 admissible under 701 and I don't know that to the extent  
12 that the motion is requesting that he not describe what he  
13 saw in terms of the blood -- direction of the blood drop  
14 as going down, the blood dripping from a position to  
15 another position and that that was different than the  
16 angle of the bookcase at the time.

17 I'm not going to preclude his talking about  
18 those observations and the conclusion there from that the  
19 body may have been repositioned or the scene had been  
20 changed in some fashion than from when it had actually  
21 occurred.

22 I think that those are legitimate to be  
23 allowed under Amayarviz, and that's A-m-a-y-a r-u-i-z, and  
24 the other cases under 701, but there are limits on what a  
25 person can testify to with regard to their observations

1 and the conclusions that be drawn and I think that's  
2 probably the most that I can say about McDormett's  
3 observations in that regard. He's not -- he's not a blood  
4 splatter expert nor has the State listed him as such or  
5 qualified him as such and I don't think they've attempted  
6 to.

7 Let's talk about the bike track tire  
8 comparisons and -- to the extent that we haven't already.

9 Mr. Butner.

10 MR. BUTNER: Thank you, Judge. Moving to the  
11 bike tire comparisons and, actually, that's not as we know  
12 not applicable to Detective McDormett but rather it's  
13 applicable to and really not --

14 THE COURT: Not that much with Brown.

15 MR. BUTNER: Not really -- yeah, not that --  
16 it's Detective Winslow that is the focus of that.

17 THE COURT: And perhaps Kennedy.

18 MR. BUTNER: Right, and perhaps Teresa  
19 Kennedy.

20 THE COURT: On the shoe prints.

21 MR. BUTNER: I would draw the Court's  
22 attention to Rule of Evidence Number 901 which basically  
23 talks about authentication and identification and  
24 indicates that -- there's a bunch of illustrations there.  
25 I'm sure the Court looked at this before but it talks

1 about identification or authentication by lay witnesses  
2 for certain types of things.

3 For example, an expert on handwriting or a  
4 comparison of a specimen or a distinctive characterization  
5 and the like or even voice identification, and some of  
6 these obviously are the subject matter of experts but lay  
7 witnesses are allowed to testify about those things and  
8 are allowed to even say such things as, they are  
9 identical.

10 And, for example, I offer to the Court a case  
11 from Virginia talking about police officers' opinions in  
12 regard to -- in this particular case the case of Jones  
13 versus Commonwealth of Virginia, talks about an officer  
14 who testified about -- let's see -- an officer identifying  
15 pursuant to that same Rule of Evidence 901 that he sought  
16 money that looked like exactly the same in this particular  
17 case. And the citation for the case, and I don't know if  
18 I said it --

19 THE COURT: You didn't.

20 MR. BUTNER: I did?

21 THE COURT: Did not.

22 MR. BUTNER: Okay. It's 228 Virginia 427 or  
23 323 Southeast Second, 554. It's a 1984 case or in a case  
24 from -- that's probably more closely similar to the one  
25 before the Court, case of State of Iowa versus McCarty,

1 M-c, cap, C-a-r-t-y, 179 Northwest Second, 548.

2 In a case that most likely would occur in Iowa  
3 that is a theft of sow bean case. There were photographs  
4 of tire tracks and boot tracks observed and photographed  
5 by a witness, a police officer, and the Court concluded  
6 that there was sufficient factual basis to serve as a  
7 foundation for the officer's testimony and he testified  
8 that -- in that particular case he testified -- I think  
9 the precise words he was using were that they were very  
10 similar in that case.

11 And in another tire track case out of  
12 Oklahoma. Oklahoma -- let's see -- Hull versus the State  
13 of Oklahoma, 751 P Second 1091, 1981 case. The testimony  
14 about an officer -- an officer made concerning photographs  
15 of the Defendant's tire tread and tire track left at the  
16 scene was admissible, and they testified that the tire  
17 tread and tire tracks, even though they weren't experts,  
18 they said that they had similarities to those of the  
19 Defendant's vehicle when they examined them.

20 And then in a Maryland case, Bernardyn,  
21 B-e-r-n-a-d-y-n, versus State of Maryland, 831 Atlantic  
22 Second 532. A police officer was allowed to testify that  
23 during a search of a Defendant's home he found a white  
24 canvass bag that was identical to the white canvass bag  
25 that the Defendant had with him when the police first saw

1 him. That bag being used to carry, I guess, tools where  
2 this particular Defendant was hacking in using a phone  
3 service for free.

4 And then in another case where a police  
5 officer was able to testify about something being almost  
6 identical. Officer Butts testified that he saw Defendant  
7 wearing some pants that he had observed in a video that  
8 were almost identical.

9 And then there's an unpublished case out of  
10 Alaska, Judge, that seems to be almost exactly the same as  
11 ours. Fresh tire tracks near the back door where a theft  
12 had occurred and the Defendant had a Bronco vehicle and  
13 the trooper compared the photographs of the Bronco's tire  
14 tread with the tire tracks left at the scene and testified  
15 that the Bronco's tires matched the tire impressions at  
16 the crime scene.

17 Does the Court want the citation to that? It  
18 is unpublished. We do have the citation.

19 THE COURT: I don't.

20 MR. BUTNER: I thought you might not. The  
21 point being that where there's this kind of basic thing  
22 where the officer has -- and it's a matter as I stated in  
23 our original discussions about this, it's a matter of  
24 foundation where the officer has made the observations  
25 where he's been present and in this particular case where

1 he actually took a tire tread and rolled it beside the  
2 tread that was present at the crime scene.

3 From his point of view as a lay witness he can  
4 testify that, as Detective Winslow put it, appeared to be  
5 identical. Recognizing, of course, that he's a lay  
6 witness and all kinds of things are, yeah, maybe  
7 additional things could be done to establish an exact  
8 match but in this particular case that's not possible.  
9 That's my argument on that issue.

10 THE COURT: Thank you. Miss Chapman.

11 MS. CHAPMAN: Your Honor, with respect to the  
12 argument about 709 providing some kind of foundational  
13 basis to permit comparisons by lay witnesses I think if  
14 you look specifically at 901(B)(3) which addresses the  
15 comparisons it specifically excludes comparisons by lay  
16 witnesses and refers only to comparisons by expert  
17 witnesses or the trier of fact.

18 And that's precisely because Rule 701 does not  
19 contemplate that lay witnesses will draw conclusions about  
20 comparisons that they make because the trier of fact is  
21 the proper body to determine what conclusions can be drawn  
22 based on the observations of lay witnesses which are what  
23 lay witnesses are permitted to testify to under Rule 701.

24 I think that particularly with respect to  
25 Sergeant Winslow one important question for the Court is,

1 what's the purpose of the opinion being offered under 701?  
2 Of course, lay witnesses can offer opinions and the kind  
3 of opinions that they are permitted to offer are ones that  
4 explain their testimony if it needs clarification by the  
5 juror to help describe their testimony if it would be  
6 helpful to the jury.

7           The purpose of Detective Winslow's testimony  
8 is not to explain what he saw. It's to try to offer to  
9 the jury a conclusion about what he saw, which is not  
10 substantiated by what the experts who reviewed what he  
11 perceived and what he saw concluded, and that is that the  
12 experts at DPS were unable to reach that conclusion in  
13 part because of whatever he took to preserve that  
14 evidence.

15           The purpose of the opinion being offered is  
16 impermissible under 701. It's not to clarify what he saw.  
17 It's not to describe what he saw. It's to offer an  
18 opinion about what he saw and whether it matched or didn't  
19 match and that's impermissible under 701.

20           And the Amayarviz case that Your Honor had  
21 mentioned earlier addresses this issue and held that the  
22 error, if any, was harmless because the jurors were  
23 permitted to look at the photographs and draw their own  
24 conclusions based on the evidence.

25           Here we don't have that, those photographs,

1 because of the way they were preserved. The jurors,  
2 therefore, would not be able to draw their own conclusions  
3 based on the evidence that Detective Winslow would also be  
4 looking at, and I think that's an additional reason to  
5 preclude his opinions about it.

6 I acknowledge the out-of-state citations  
7 provided by the State but I think that if Your Honor looks  
8 at State versus Maryland, which happens to be a published  
9 Arizona case, 184 Arizona 9, footprint comparison  
10 testimony is the proper subject matter of expert  
11 testimony, and the Court goes to length to talk about what  
12 kind of training and kinds of experience the officer in  
13 that case had.

14 There is a 25 page protocol for comparing tire  
15 tracks that was provided by DPS and there has been  
16 absolutely no information that Detective Winslow has any  
17 training or experience in making the kinds of conclusions  
18 that the State is having him offer.

19 And for that reason I think that any testimony  
20 by Detective Winslow offering any conclusion about what he  
21 saw in terms of the tire tracks vis-a-vis one another,  
22 particularly here where the jury is unable to see what he  
23 also saw to draw their only conclusion is impermissible  
24 under Rule 702, is not compensated under Rule 901 and  
25 would create an error in that the jury, the trier of fact



1 wouldn't be making those conclusions but it would be a lay  
2 unqualified witness.

3 THE COURT: The Rule 701 as both sides note  
4 indicate that if the witness is not testifying as an  
5 expert the witness' testimony in the form of opinions or  
6 inferences is limited to those opinions or inferences  
7 which are, A, rationally based on the perception of the  
8 witness and, B, helpful to a clear understanding of the  
9 witness' testimony or the determination of a fact in  
10 issue.

11 I think that Amayaruiz still with -- still  
12 stands for the proposition that one must be very  
13 careful with the nature of testimony that has been  
14 presented that to allow the officer to testify that the  
15 tracks appeared identical or provided a match would be  
16 improper and I'm going to preclude that.

17 To talk about the observations that they were  
18 similarities between what was rolled from a tire versus  
19 what was found in the dirt on the ground I think is  
20 permissible under Amayaruiz which is helpful too in  
21 understanding what was being observed by the percipient  
22 witness, but I will preclude the use of terms that add the  
23 level of certainty that I think is prohibited except  
24 through an expert such as match or identical.

25 And I think that this is also the Court's

1 observation that it has already been pointed out to me and  
2 I anticipated it to be pointed out to the jury, that the  
3 type of tire that was on Mr. DeMocker's bike is the most  
4 common mountain bike tire at least in the Prescott area,  
5 and there may be some other issues alluding to the request  
6 for Willits instruction that may also apply and also  
7 inform the jury so that there are appropriate limitations  
8 on their understanding of what can and can't be done with  
9 these kinds of comparisons. So I'll stand by what I've  
10 already ruled in connection with that.

11           Teresa Kennedy's situation is not dissimilar  
12 from Dan Winslow's in this listing that the defense gave  
13 me. Hers, however, referring to shoe print comparisons  
14 and conclusions about that. Could you elaborate a little  
15 bit on because that was in an interview that I didn't have  
16 access to or participation in.

17           MS. CHAPMAN: Your Honor, Miss -- Detective  
18 Kennedy did some tracking and in her interview talked  
19 about conclusions she made.

20           THE COURT: Tracking in terms of going from  
21 Point A to Point B, trying to follow certain tracks?

22           MS. CHAPMAN: Exactly. And also -- so that's  
23 one issue, was the tracking. She also opined that whoever  
24 made those tracks that she was tracking was familiar with  
25 the area and did some comparisons of different tracks that

1 she saw in the area, different shoe prints tracks that she  
2 saw in the area.

3 THE COURT: Were these documented in terms of  
4 photographs that are preserved and Bates numbered and the  
5 like?

6 MS. CHAPMAN: Well, the tracking was  
7 documented through some GPS activity which I think we now  
8 have been able to obtain a copy of and we also do have  
9 photographs of some -- some of the tracks that she took.

10 THE COURT: Some but not all, not a video of  
11 showing from Point A to Point B?

12 MS. CHAPMAN: That's my understanding, there  
13 is no video.

14 THE COURT: Okay. Go ahead if you want.

15 MS. CHAPMAN: Your Honor, we have the same  
16 objection to Miss Kennedy making any conclusions about the  
17 tracking or who made what tracks and comparing the tracks  
18 one to the other.

19 I don't believe that Miss Kennedy's expertise  
20 is in shoe tracking. She hasn't been disclosed as a shoe  
21 tracking expert. She wasn't included in our original  
22 motion. So I don't know but, again, looking at the  
23 State's disclosure she hasn't been disclosed as an expert  
24 in this area.

25 Certainly, tracking a shoe print and drawing

1 conclusions about what shoe left what prints and whether  
2 those prints match and the order and direction in which  
3 those prints were made is a matter of specialized  
4 knowledge and we would suggest that she doesn't have such  
5 knowledge or training and would ask that she not be  
6 permitted to draw conclusions about those tracks or the  
7 tracking.

8 THE COURT: If I might ask another question,  
9 does she purport to compare tracks that are found outside  
10 the yard with tracks that are found inside the yard and  
11 the like?

12 MS. CHAPMAN: Yes, she does.

13 THE COURT: And other than photographs is  
14 there -- is there any disclosure about experts who come to  
15 conclusions about shoes from which the prints derived,  
16 size of the shoes, things like that, is there any expert  
17 that is disclosed?

18 MS. CHAPMAN: We have not received any  
19 disclosure about footprints other than there was some  
20 disclosure that excluded some of the prints from some of  
21 the shoes that the officers at the scene were wearing. I  
22 know that there is a tire track expert disclosed but there  
23 is no foot tracking expert or shoe tracking expert.

24 THE COURT: Shoe print expert?

25 MS. CHAPMAN: Right.

1 THE COURT: Thanks for the clarification,  
2 Miss Chapman, it's helpful.

3 Mr. Butner.

4 MR. BUTNER: Judge, Teresa Kennedy has been to  
5 specialized tracking school and that's, in essence, the  
6 level of her expertise. She matched the shoes that were  
7 worn by the victim with shoe prints that showed the run  
8 that the victim went on prior to the time of the homicide  
9 her -- basically her routine run at about 5:00 in the day  
10 and she was still wearing the same shoes that she wore for  
11 that run and --

12 THE COURT: When the body was found?

13 MR. BUTNER: When the body was found, right.  
14 So her testimony is that the prints from those shoes match  
15 the ones that Teresa Kennedy followed exiting the house,  
16 leaving the house and going out to a far point away and  
17 then coming back to the residence.

18 Teresa Kennedy also testified about shoe  
19 tracks that there were other shoe tracks in the area that  
20 matched each other, okay, but we're not matched to any  
21 known shoes, and those shoe tracks were followed by her  
22 into the yard. There were two shoe prints in the yard  
23 where the homicide occurred and then those shoe prints  
24 went out to a location where the bike tracks arrived at.

25 And then her statement was that those show

1 prints accompanied the bike tracks in and out, coming in  
2 from Glenshandra and then going out through the gate at  
3 Glenshandra.

4 THE COURT: If she is going to testify as a  
5 tracking expert why hasn't she if she hasn't been  
6 disclosed as an expert with regard to that?

7 MR. BUTNER: You know, Judge, I didn't really  
8 think about that in terms of her qualifications in that  
9 regard. They were disclosed in an interview and I suppose  
10 I should identify her has a, quote, tracking expert, that  
11 being a person that has -- I didn't think there was such a  
12 thing, mind you -- but that being a person that has more  
13 training and education and experience in that particular  
14 field than a normal person such as myself who I don't have  
15 any tracking experience because she does have that kind of  
16 training and that kind of experience.

17 THE COURT: Nonetheless, do you really  
18 anticipate having her testify that whoever left the tracks  
19 had to have been familiar with the area?

20 MR. BUTNER: No. I do not have -- I do not  
21 anticipate having her testify to that fact. You know,  
22 that is clearly argument and I think, you know, suggested  
23 by her during the course of her interview. I don't  
24 remember the exact circumstances of that statement but I  
25 do remember, you know, that's loose language, so to speak,

1 in an interview context.

2 THE COURT: Are you anticipating based on the  
3 documentation of the various types of shoe prints that  
4 were observed, if you have such documentation, having  
5 disclosed expert for shoe print comparison purposes, like  
6 a tool mark comparison?

7 MR. BUTNER: I have sought to have this  
8 accomplished but have been unsuccessful to date.

9 THE COURT: So no?

10 MR. BUTNER: The answer at the present time is  
11 no.

12 THE COURT: Short answer is no?

13 MR. BUTNER: That's correct.

14 THE COURT: Okay.

15 MR. BUTNER: And there's some conclusions  
16 about the maker of the shoe tracks. I'm assuming that  
17 that means like this conclusion about a person familiar  
18 with the area. I assume that it doesn't mean the  
19 manufacturer of the shoes that makes those tracks or  
20 something like that because she's not familiar with that  
21 kind of thing and I would not be eliciting that kind of  
22 testimony from her.

23 MS. CHAPMAN: No. That was just referring to  
24 the -- but there are conclusions about the order in which  
25 these tracks were made and that they went to a location

1 and then came back and then went to another location, so  
2 part of it is the order that they were made when they were  
3 made in relationship to each other, that that's  
4 objectionable, and as a lay person's testimony and, again,  
5 she has not been to date disclosed as an expert.

6 THE COURT: Well, I've heard that apparently  
7 she is going to be disclosed as a tracking expert now. I  
8 don't know without that foundational, clearly, I don't  
9 think she can opine much of what Miss Chapman referred to,  
10 and even with that expertise, I don't think one can opine  
11 about the intentions or mental processes of a person who  
12 opines that they were familiar with the area or not, that  
13 works well in novels but not so well in trials.

14 So, in terms of shoe print comparison I think,  
15 again, 701 is limited to percipient witnesses testifying  
16 about things that are helpful to the jury that are not  
17 subject to other expertise. So all of this depends on  
18 Miss Kennedy's part of it on qualifying her as an expert,  
19 and perhaps we ought address that before the trial happens  
20 so that there's no confusion as to whether she is going to  
21 be found qualified or not qualified. We don't have to do  
22 that in the middle of trial outside the presence of the  
23 jury.

24 MS. CHAPMAN: Your Honor, once we receive the  
25 disclosure I'm sure we'll file that objection.



1 THE COURT: Thank you. What else do you think  
2 we need on this 701, 702 issues, Mr. Butner?

3 MR. BUTNER: I don't know if there's anything  
4 else. I think I understand the Court's ruling, and just  
5 to clarify, if I am going to seek to have testimony from  
6 Detective Page or Detective Kennedy in terms of some  
7 elevated level of expertise concerning the subject matter  
8 that we've been discussing in respect to each of them,  
9 that being computers for Page or tracking for Kennedy,  
10 then we need a hearing before the Court where additional  
11 foundational-type evidence is presented to the Court to  
12 qualify them?

13 THE COURT: Yes. And you need to disclose  
14 that to the defense so that they're firmly aware of  
15 whether you're seeking to have somebody qualified as an  
16 expert or not.

17 MR. BUTNER: This person beside me has been  
18 typing that up and it will be promptly disclosed to the  
19 defense, Judge.

20 THE COURT: Would you caution, please,  
21 Sergeant Winslow about the use of terminology so that we  
22 don't have the issue come up during the trial?

23 MR. BUTNER: Yes, I will Judge.

24 THE COURT: His making some unqualified  
25 matching kind of linguistic connection between what he saw

1 of the bike and the bike tires.

2 MR. BUTNER: All right. Well, he's not to use  
3 the terms identical or match. He can use the term similar  
4 or similarities.

5 THE COURT: Well, he can use -- yeah, he can  
6 use the terminology that doesn't lend that kind of degree  
7 of expertise to his opinion. He's not qualified as an  
8 expert and I don't think would be.

9 Well, Mr. Sears and Miss Chapman, does that  
10 cover what we need to for the time being on those issues?

11 MS. CHAPMAN: It does, Your Honor.

12 THE COURT: Mr. Sears, our next issue then.

13 MR. SEARS: Judge, I think now that it might  
14 be a good time to move right into the Youngblood/Willits  
15 motion because it deals with the very same bicycle tire  
16 impressions and shoe print impressions that we've just  
17 been talking about.

18 THE COURT: Makes sense to me.

19 MR. SEARS: If I could -- can I get the easel  
20 out, Phil? I'll take my map away. Tired of looking at  
21 it.

22 (The Bailiff complies.)

23 MR. SEARS: Maybe out here so the Judge can  
24 and Mr. Butner can see what we're doing.

25 (The Bailiff complies.)

1 THE BAILIFF: The Judge can see.

2 MR. SEARS: Angle it this way so Mr. Butner  
3 can see.

4 (The Bailiff complies.)

5 THE BAILIFF: And a couple of pens for you.

6 MR. SEARS: Do we have -- thank you. Okay.  
7 Let me, Judge, if I could, kind of set the stage for this  
8 discussion. I'm going to try to draw and draw on the  
9 easel here, not to scale, just something that will orient  
10 us in general. You have seen photographs and maps already  
11 of this area but the area that we're going to be talking  
12 about is, generally speaking, this is -- I'll put a BP on  
13 the left-hand side here.

14 I've drawn a line that runs from the top to  
15 the bottom of the page. This is intended to represent the  
16 barbed wire fence line that separates the property at  
17 Bridle Path where I put a BP. This (indicating) is the  
18 guest house next to it and the barn which is not a  
19 triangle. I just happen to draw a triangle. These  
20 (indicating) are three structures on the Bridle Path  
21 property where the crime scene took place.

22 This (indicating) is up at the top. Here  
23 (indicating) this road that comes off the page is the tail  
24 end of Glenshandra which, of course, goes out about a mile  
25 or so and intersects Williamson Valley north of Bridle

1 Path.

2 THE COURT: North being generally to the top  
3 of the page?

4 MR. SEARS: Yes, sir. I'll do that. And  
5 this (indicating) large white area is open land which is a  
6 combination of deeded land belonging to the James Family.  
7 It's a deed well ranch, and some checker boarded sections  
8 of State land here (indicating). And we've heard a lot of  
9 testimony about the open land involved in this case.

10 And to sort of reset the scene here, on the  
11 night of July 2nd, early morning of July 3rd, police  
12 officers were dispatched to try and find nearby points of  
13 entry from public roads onto this open land. And a group  
14 went to Glenshandra without a great deal of instruction  
15 and they were looking for anything suspicious.

16 They actually at one point were looking with  
17 flashlights between the houses. There are houses on  
18 either side of Glendshandra here (indicating) and then if  
19 you drive in that area it's through a nice subdivison  
20 there are houses on fairly large lots as you come down  
21 here (indicating).

22 THE COURT: I'm not unfamiliar with that part  
23 of the county.

24 MR. SEARS: Thank you. And right here  
25 (indicating) at the end of Glendshandra there are two

1 houses more or less across from each other, and then here  
2 (indicating) at the end there is a little area of dirt and  
3 there is a gate in the fence. The gate is a metal gate  
4 and has a padlock on it. And the fence is a wire fence on  
5 either side of that.

6           What we're going to be talking about here are  
7 impressions made by what appear to be bicycle tires and  
8 shoe prints impressions. And, generally speaking, what  
9 the police eventually found were a series of bicycle tire  
10 impressions that went for roughly 100 yards more or less  
11 due east away from this gate and there were a set of  
12 outbound -- what they perceived to be inbound impressions.

13           And, generally speaking, based on the  
14 photographs the impressions were made by bicycle tires  
15 that had two different distinctive tread patterns. One  
16 tire had, in general, terms what looked like Chevron or  
17 flying wings. They were raise and made an impression.  
18 And the other tire had a series of horizontal bars to the  
19 front and back tire.

20           We have learned, and I think the State would  
21 agree based on the photographs, the inspection of  
22 Mr. DeMocker's bike, that his bicycle had tires that had,  
23 generally speaking, this (indicating) tread pattern.  
24 Further investigation in which the State anticipated with  
25 the manufacturer of the tires and Mr. DeMocker's bike

1 indicates that these are Velociraptor tires.

2 And as the Court observed now several times  
3 including today are -- were extremely popular tires.  
4 Numbers in the millions were sold. They were sold in  
5 pairs. The front tires would have a Chevron and the back  
6 tires would have these horizontal bars.

7 What we also learned in interviews in which  
8 the State has participated in is that there were some  
9 subtle variations over time throughout the manufacturer of  
10 these tires, that, for example, the man who designed the  
11 tires, who we actually sat with in their corporate offices  
12 in California, could identify just by looking at the tires  
13 which of the various plants that they were manufactured at  
14 overseas, which different models.

15 And when you combine all of the different  
16 subsets, you are still talking about millions of tires  
17 that have this general front Chevron, rear horizontal  
18 pattern. Then -- so what happened was -- this is in the  
19 middle of the night. This is discovered. The police put  
20 crime scene tape up and do their best to keep people away  
21 from this. There really isn't nobody out there. It's  
22 early morning hours.

23 When the sun comes up the next day Detective  
24 Kennedy, who as Mr. Butner says, has had some training in  
25 creating tracks, is dispatched to the scene and her first

1 work is looking for shoe prints and she sees some shoe  
2 prints near the Bridle Path house on the west side of the  
3 fence on the Bridle Path property side that goes down in  
4 this (indicating) general area.

5           And about here (indicating) there is -- you  
6 can't really call it a gate. It's really a series of  
7 wooden slats in the barbed wire fence that were built  
8 there, obviously, to allow people to climb up and over  
9 without going through the barbed wire. It's not a gate.  
10 It's not steps but it is a way to get over the fence.

11           These impressions according to Detective  
12 Kennedy go through that area and head out generally in a  
13 northeasterly direction for about a mile and a half and  
14 then turn around and more or less come back along the same  
15 way. Based on her observations and what she's been told  
16 she came away with the idea that these were Carol  
17 Kennedy's running shoe impressions, and that, based on the  
18 fact that they had information that eventually that people  
19 had seen her on the evening of her death out earlier in  
20 the evening running in this area. She came away from with  
21 the further conclusion that must have been her running  
22 route that she left the house and did about a three mile  
23 loop and came back.

24           Further investigation at the area where the  
25 bicycle track impressions end and some bushes here showed

1 that there were shoe print impressions which as Mr. Butner  
2 said in her opinion were made by the same shoe that  
3 started out heading away from crossing the running shoe  
4 impressions and generally speaking came down heading  
5 pretty much due south and then came over towards the  
6 property and that there were two impressions inside the  
7 property that she believed were associated with all of  
8 these other shoe impressions in this general area.

9           As she was working on this project she got  
10 dispatched and told to report to Glenshandra. So she got  
11 in her car and, actually, we have downloaded the  
12 information from her GPS unit and done some mapping, which  
13 she was unable to do. We could actually see her. She  
14 didn't turn her GPS unit off. So we know how she drove.  
15 We know which route. She drove all the way out to  
16 Williamson Valley and got on Glenshandra and then was put  
17 in touch with the people that had found the bicycle  
18 impressions and did some work there.

19           There is a difference in her testimony and the  
20 testimony of Sergeant Winslow about whether there were any  
21 shoe print impressions associated with these bicycle  
22 tracks. She says no. Winslow says no, but here's where  
23 this gets interesting. She also then discovered a set of  
24 what she thought were the same impressions that headed for  
25 awhile up along the fence line and then veered off and



1 wound up back at the area where the bicycle impressions  
2 ended and where the shoe print impressions ended.

3           So you have this sort of securitist route  
4 that Mr. Butner was telling you about here. So this also  
5 in general term is what she testified to. We also know,  
6 and I'll just give a quick overview how we do this.  
7 Mr. Robertson was able to download her unit. She wasn't  
8 terribly familiar with her own handheld GPS unit and  
9 thought that if she wanted to create DPS way points she  
10 had to click the switch, not realizing that when it was on  
11 in track mode it would do that for her.

12           And so she created a first map that had  
13 hundreds of little dots and then when we got down to here  
14 you couldn't make any sense of it. You got over here  
15 (indicating) and there were dots. What we've been able to  
16 do, and we have not yet shared it back with the State, is  
17 to create a map using the track function that shows a much  
18 shorter path but also shows her on other days walking in  
19 this general area here (indicating).

20           A couple of things about this. All of this  
21 work was done on -- this work being what I described as  
22 first -- not these intermediate tracks, but what she  
23 called Track 1, Track 2, and Track 3, were all done on the  
24 same day on July 3rd from midday until mid afternoon. She  
25 did that work.

1           She then came back a few days later wrote a  
2 report and told us in an interview by then it had rained  
3 several times and cattle had gotten in and obliterated a  
4 lot of what she had seen on the 3rd. So here's -- this is  
5 what we're talking about.

6           Now, subsequently -- this is the state of the  
7 evidence as we understand it -- Sergeant Winslow was the  
8 photographer. Detective Kennedy took a few photographs, a  
9 handful of photographs with a small commercially available  
10 digital camera. She conceded that she has no forensic  
11 training in photography or in the preservation of any of  
12 this kind of evidence. She was just taking what she  
13 considered to be informational shots.

14           The majority of photographs taken perceived  
15 by the State and disclosed to us were then taken by  
16 Sergeant Winslow. Sergeant Winslow told us at an  
17 interview that he likewise has no special training in  
18 forensic photography. He was unfamiliar with even the  
19 existence of the DPS protocols for the collection and  
20 preservation of this evidence. Detective Kennedy also  
21 said she was unfamiliar, unaware, of these DPS protocols.

22           A number of photographs were taken. Let's  
23 start with the bicycle tracks first. There are in  
24 evidence. Many photographs trying to show the general  
25 direction of the tracks and then photographs of a number

1 of individual sections of the track. Some of them are  
2 taken at oblique angles. Some are taken from more  
3 directly overhead. A few of them, relatively speaking,  
4 use a scale which is basically a metal box with  
5 measurement rods on it put around some of the impressions  
6 or scales laid along side the impressions.

7           When you look at the protocols, Your Honor,  
8 that actually, interestingly enough, were disclosed to us  
9 by the State, these were matters we knew about but the  
10 State disclosed to them, the ones that are attached to my  
11 motion have Bates number in the State's disclosure.

12           When you look at in general terms how the DPS  
13 protocols tell you to preserve this evidence, none of that  
14 was done. They say that the care in general -- and there  
15 are many more particular parts you can read for yourself  
16 but the idea is to photograph the entire track even if it  
17 means laying tapes out to get the measurements. No  
18 measurements of a length of these tracks was ever taken.

19           The photographs -- the directional  
20 photographs were taken as crime scene photographs rather  
21 than as forensic photographs. In general DPS says take  
22 photographs from directly above the evidence looking down  
23 using the alternative light source for comparison. None  
24 of that was done except for an occasional flash but  
25 nothing was done in a systematic basis. It recommends

1 taking photographs from three different angles of each  
2 place that you want to document. It talks about using the  
3 scales.

4           What they did was hit or miss using basically  
5 crime scene photographing techniques. Just, you know, I  
6 want to take a picture of something, so I'm just going to  
7 take a picture of something, as opposed to understanding  
8 the difference between that and forensic photography.

9           With respect to the footprint evidence the  
10 photographing was even more half-hazard because of  
11 Detective Kennedy's unfamiliarity with the GPS unit.  
12 There is no accurate documentation of where the  
13 photographs were taken. So that if you had a photograph  
14 of a particular footprint you cannot now determine which  
15 footprint it was. You know, she can't say anything about  
16 that it.

17           There were no efforts to even count or  
18 identify how many different shoe prints impressions there  
19 were. The DPS protocols talk about other methods of  
20 preserving impression evidence, including evidence made in  
21 all kinds of surfaces including sand, and it talks in  
22 general about casting techniques.

23           It is unclear to us from the interview  
24 whether the sheriff's office knew how to do this or even  
25 had the materials. What they said candidly in the

1 interview was now we do, which leads us to conclude that  
2 perhaps at the time they either didn't know how to do it  
3 or didn't have the equipment, but regardless, no efforts  
4 were made to cast or preserve permanently in three  
5 dimensions any of these impressions, any of the bicycle  
6 tracks, or any of the shoe print impressions.

7           What did happen was an experiment by  
8 Detective Sergeant Winslow where they had Mr. DeMocker's  
9 bike brought out to the scene, took the tires off, took  
10 the wheels off, and they rolled them next to the subject  
11 impressions, and that's what produced the testimony that  
12 you've heard about in the previous motion about his  
13 opinion that they appear to be identical.

14           What the State then did was submit this  
15 evidence, this tire print evidence, to the Department of  
16 Public Safety and a Criminalist Mr. Hoang, H-o-a-n-g,  
17 wrote a scientific examination report which said that  
18 because of the lack of forensic photography, the lack of  
19 proper lighting and use of a scale, he was unable to make  
20 any conclusions other than to note that the two treads --  
21 the two treads being the test rolling and the subject  
22 treads -- appeared similar and that was all he would do  
23 and that's the subtotal of his opinion.

24           No such effort was made to have anyone with  
25 any scientific training as the case law requires evaluate

1 the shoe print evidence. Instead what happened is through  
2 a series of search warrants every shoe owned by  
3 Mr. DeMocker over a period of time was taken. The shoes  
4 he said he was wearing that night and all of the shoes in  
5 his home and every place else including a search warrant  
6 executed in October when he was arrested, went back and  
7 took shoes from his apartment in Maricopa County and,  
8 again, running through his home here in Prescott.

9           And Detective Kennedy told us at the  
10 interview that she had looked at photographs of all of the  
11 shoes and they're in evidence -- all of the treads of all  
12 of the shoes and she had some photographs that she had  
13 taken that she thought pretty clearly showed the tread  
14 pattern of these shoe prints impressions and she concluded  
15 just looking at it that no shoe associated with  
16 Mr. DeMocker matched these impressions.

17           The sheriff's department then attempted to  
18 see if the FBI had shoe print comparison experts and in  
19 disclosure we received the communication back saying they  
20 did not, but what they had was database. And there are a  
21 couple of very blurry faxes from the FBI back to the  
22 sheriff's office suggesting possible makes and models of  
23 shoes.

24           They actually look like advertisements to us.  
25 It's difficult to tell but they look like pages out of

1 some sort of an advisement of shoes. Again, those shoes  
2 looking at them do not associate with any shoes owned by  
3 Mr. DeMocker or any shoes seized by the police.

4 So this is the problem that we have and this  
5 is where it gets a little bit complicated when you apply  
6 Youngblood and Willits to this. Let's start with the  
7 obvious. The police department knew or should have known  
8 that it was possible and necessary and appropriate and  
9 required to apply proper forensic evidence collection and  
10 preservation techniques for this impression evidence.

11 They clearly knew by 12:30 in the morning or  
12 thereabouts that this evidence was out there. They knew  
13 by the next day because Mr. DeMocker had given a lengthy  
14 uncounseled interview overnight. They knew that  
15 Mr. DeMocker had told them that he was riding his mountain  
16 bike in an area several miles away.

17 By the afternoon they had seized  
18 Mr. DeMocker's mountain bike and all of his shoes. So  
19 they had all of this evidence in their possession.  
20 Remember, that the work that Detective Kennedy and  
21 Detective Sergeant Winslow were performing was being done  
22 in the afternoon while this evidence was being collected  
23 and while it was in the possession of the State because  
24 among other things, they were able before the sun went  
25 down the next day to bring Mr. DeMocker's bike out to the

1 scene to perform these side-by-side rolls. That's one of  
2 the elements of Youngblood. Did the State know about the  
3 importance and the possible inculpatory or exculpatory  
4 nature of this evidence.

5           Where the problem begins is the failure then  
6 to preserve in any way, any of this impression evidence  
7 for any one else's further identification. The failure to  
8 preserve, to forensically photograph or to cast the  
9 bicycle impressions made it, first, impossible for the  
10 State's own criminalist to make any useful conclusions  
11 about this simple rolling of Mr. DeMocker's tire in the  
12 dirt next to the subject impression, that's gone forever.

13           Those photographs can't be changed. There  
14 aren't more photographs. It's over. The footprint  
15 evidence is somewhat more troubling because even less was  
16 done to try and preserve the footprint evidence. Even  
17 some of the basic things, like, if you're going to take a  
18 picture tell us where it was. Do something with the GPS  
19 Unit or mapping or better still with tapes and  
20 photographs, because you're using a digital camera, you're  
21 not paying for film to document which foot impressions  
22 you're doing. Count the total number of them and show us  
23 visually where this trail of footprint or shoe print  
24 impressions actually was. We know where she was now from  
25 the GPS Unit but we don't know where these impressions



1 were.

2 Now, how is it -- and which is where it gets  
3 interesting the State has said, in essence, well, you  
4 shouldn't be concerned about the fact that the shoe print  
5 impression wasn't preserved because it helps you. It's  
6 nothing the State can use because all of these shoe print  
7 impressions cannot be connected to Mr. DeMocker.

8 And they say, well, then you're not  
9 prejudiced. If they're not Mr. DeMocker's, you're not  
10 prejudiced. If we only had the shoe print evidence that  
11 would be absolutely true, that would be irrelevant  
12 perhaps, or perhaps it would be relevant to show that  
13 somebody else was walking out in this area and apparently  
14 walking up to and on to the crime scene itself, but here's  
15 the big problem.

16 The big problem is the State has not given up  
17 the idea, and we know that from counsel's arguments here  
18 today, that these bicycle tire impressions are connected  
19 to Mr. DeMocker and his tire. So that then creates  
20 another really interesting dilemma for the State. If they  
21 were allowed to go forward and without any interference by  
22 the Court, just freely present this bicycle tire  
23 impression evidence, what do they do with the shoe print  
24 impression? What do they do with that?

25 Well, they have put it out there. They kind

1 of hang their head at trial and say, well, gosh, we're  
2 sorry, we wish we had done a better job, and maybe this is  
3 Mr. DeMocker's and maybe it's not. We just couldn't find  
4 his shoes but remember when another prosecutor had the  
5 case that's when we got the speculation, he burned the  
6 shoes. He threw them away before he got home. The State  
7 didn't want to give this up, because logically, if the  
8 shoe prints are not Mr. DeMocker's, how are they connected  
9 to the bicycle tire impressions? How does that fit?

10           So the State now wants you to let them come  
11 in and have Detective Sergeant Winslow use words like  
12 similar, maybe bring Mr. Hoang up from the crime lab, and  
13 have him say similar, and then they want to sort of shrug  
14 their shoulders and say, gosh, we could have done better  
15 about the shoe prints but this is what happened.

16           This was Mr. DeMocker. He rode his bike down  
17 to Glenshandra that night and went through the fence,  
18 interestingly, not leaving any shoe prints apparently or  
19 bicycle tire impressions on this side, being the pavement  
20 side, of Glenshandra, nor are there any shoe print  
21 impressions on this side. This side being the dirt side  
22 of the gate.

23           So somehow the bike magically goes from  
24 Glenshandra up through the air and starts here some  
25 distance away from the gate and apparently how that bike

1 got there, the person that then road the bike here, and  
2 did these things, isn't leaving any shoe prints,  
3 impressions, on either side of the fence. We don't know,  
4 but that's part of their theory.

5 Now, what I've suggested is that this is  
6 Willits at its clearest and I think that the argument can  
7 be made and I made the argument that this is also  
8 Youngblood. Let's started with Willits.

9 The failure of the police to preserve in any  
10 reasonable way any of this evidence absolutely and forever  
11 prevents the defense from examining or conducting any  
12 experiments of any of this information.

13 So even if we were to get Mr. DeMocker's  
14 bicycle out of evidence and try to run a test, we do not  
15 have the ability because of their failure to photograph in  
16 an adequate professional and forensic way to compare -- to  
17 really compare with a scientist, the impressions made by  
18 Mr. DeMocker's bicycle with the State's evidence.

19 We would get no further than the State's  
20 criminalist which, we're going to be able to say it's  
21 similar. Well, how is that important and how could that  
22 be exculpatory? Remember I told you at the beginning that  
23 the bicycle tire manufacturer said there are differences  
24 in these tires.

25 One of the things we know from the National

1 Academy of Science Project released this spring is that  
2 impression evidence -- what you're really looking for is  
3 not similarities, you're looking for dissimilarities. You  
4 are looking for anomalies. You're looking for a missing  
5 Chevron or a partial Chevron or a cut across the tire.  
6 Something unusual about one test subject being compared to  
7 the other.

8                   And what the National Academy report says in  
9 the absence of that sort of anomaly to compare this you  
10 shouldn't make conclusions as a forensic scientist that  
11 this is identical to this. The same thing with shoe print  
12 evidence. The problem is compounded with the shoe print  
13 evidence because of the utter lack of preserving all of  
14 the shoe prints.

15                   All we have is Detective Kennedy's assertion  
16 with no documentation that these are all the same shoe  
17 prints. And she said in her interview there doesn't seem  
18 to be any other shoe prints around here. Seemed to be one  
19 easily followed track that made this general southerly  
20 sweep and then due west right to the crime scene. This  
21 could be really important. This could be really  
22 important. One of the things this could be is the real  
23 killer.

24                   This could be a track that's not associated  
25 with the bicycle tracks because we also know that they

1 never bothered to look any where outside this general  
2 perimeter for other bicycle tracks, other shoes prints.  
3 They didn't go north. They didn't go east. They didn't  
4 go south because they found what they were looking for,  
5 put the blinders on and said, this is it.

6               We know what happened. Rode his bike in here  
7 (indicating). Ditched his bike behind the bush. Walked  
8 around, went right here (indicating) and then went back --  
9 more or less back to his bike, and then rode it out.  
10 That's their theory of the case. That's what they want to  
11 argue to the jury.

12              The purpose of the Willits instruction is  
13 obvious. It's to say, wait a minute, if you make this  
14 evidence unavailable to the defense to test and evaluate  
15 you should not be able to say with impunity this is the  
16 way it happened.

17              What you get instead is a Willits instruction  
18 that says, wait a minute. If the evidence was not  
19 preserved, a finding for the jury, then the jury may, not  
20 must, but may infer that the true fact of that evidence is  
21 against this State's interest.

22              That's what has to happen in this case. They  
23 have left us with absolutely no alternative. There is  
24 nothing we can do to undo this. Telling us that we should  
25 be happy that the shoe print impression doesn't match

1 Mr. DeMocker is not enough unless it's coupled with a  
2 Willits instruction about the bicycle tire impressions  
3 that leaves the jury with this possible conclusion which  
4 we would certainly argue that none of this is associated  
5 with Mr. DeMocker.

6           It may or may not be significant to this case  
7 but whatever the true facts of this evidence is, it is not  
8 in the State's interest. It's against the State's  
9 interest. More could have been done. We could have  
10 answered questions about -- and I've already gotten  
11 questions about when these impressions were made. Those  
12 are questions that go to the weight of this. They have  
13 statements about it rained. These appeared fresh.  
14 There's lots to be said about that.

15           I'm simply talking about the fundamental  
16 failure forensically to preserve this obvious evidence  
17 when the methodology for it, the equipment, and the  
18 technique was known to or should have been known to the  
19 State and was available.

20           If they didn't have the people to do it, they  
21 could have brought somebody in. They did that later.  
22 There was Blue Star work done inside of the house by the  
23 Gilbert Police Department. They had the Gilbert Police  
24 Department come up the following week and use the Blue  
25 Star spray trying to find blood inside the house.

1           If they didn't have the skill and expertise  
2 to forensically preserve this evidence, keep everybody off  
3 of it, not just at the gate, keep everybody off all of  
4 this, and bring in somebody who knows how to do it, then  
5 we wouldn't be having this argument.

6           I suggest to that it's a Youngblood argument  
7 because of that, the level of danger that this poses to  
8 the Defendant in this case. If this evidence is allowed  
9 in at all in this case, the potential for confusion by the  
10 jury, the potential for misidentification by the jury, is  
11 traumatic, even with a Willits instruction.

12           The jury might just think for some reason  
13 that the State has proved beyond a reasonable doubt that  
14 this is Mr. DeMocker in this case. When, in fact, what  
15 the State has done is make it impossible for anybody,  
16 including the defense, to know who this is. They should  
17 not be allowed to do that.

18           The Youngblood remedy is dismissal. This is  
19 a key part of their case. The State can't deny that.  
20 Their case is built on a few basic facts and among them  
21 is, this is where Mr. DeMocker came, this is how he got  
22 into the crime scene, this is how he left the crime scene.  
23 And this is their evidence, Your Honor, and I would submit  
24 that the case law demands a Willits instruction and leaves  
25 the door up for a Youngblood dismissal.

1 THE COURT: Thank you.

2 Mr. Butner.

3 MR. BUTNER: Judge, first of all, you need to  
4 look at what the defense is citing as the standard, so to  
5 speak, with the Yavapai County Sheriff's Office should be  
6 adhering too, and that's this Arizona Department of Public  
7 Safety Scientific Analysis Bureau standard.

8 In other words, it's the lab down there that  
9 has this protocol and this standard. This is for when you  
10 call a lab technician out to the scene and before you can  
11 do that, you have to know that, oh, this is the kind of  
12 situation where we need an expert to come out and look at  
13 it.

14 There's no showing here that the Yavapai  
15 County Sheriff's Office knew that it was that type of  
16 situation. In fact, clearly the showing is that they  
17 didn't. That's why they had -- and most of the  
18 photographs taken in this case were not taken by Detective  
19 Sergeant Winslow. They were taken by Dawn Miller.

20 And Dawn is trained in crime scene  
21 photography, a limited amount of training, but she's not  
22 trained in forensic photography and she readily admitted  
23 in her interview that she doesn't know anything about  
24 that. She just thought she should take good pictures that  
25 depicted the scene accurately and this was pursuant to the



1 direction of the detective that accompanied her.

2 THE COURT: She is an employee of YCSO?

3 MR. BUTNER: She's an employee of YCSO, that's  
4 correct. And so she did. She accompanied Detective  
5 Winslow out there. They took pictures of the tire treads.  
6 They took pictures of the footprints and even those  
7 pictures were not very good.

8 The State took these same photographs to the  
9 DPS crime lab and asked the crime lab do their best to  
10 enhance those photographs so that they might be usable.  
11 The crime lab reported to us that it just simply was not  
12 possible. They could not be enhanced to the level where  
13 they would be usable for any kind of expertise and expert  
14 opinion on their part.

15 So you start off with, well, did the sheriff's  
16 office act in bad faith here? Absolutely not. When this  
17 standard was disclosed to the defense it was a standard  
18 that we at the county attorney's office managed to obtain  
19 from the lab down at DPS and we disclosed it in good faith  
20 to the defense in this case.

21 So, in essence, we have here some people that  
22 are not experts in terms of tire tracks and footprints  
23 analyst as has been repeatedly pointed out by the defense.  
24 Going out to crime scene and looking at the crime scene  
25 and thinking just like all of these police officers in all

1 of these cases that we have cited to the Court concerning  
2 footprints, I can look at footprints. I can take  
3 photographs of footprints, I can tell if they're the same  
4 or pretty much similar or not, and obviously they were  
5 mistaken in that regard.

6 Now, we get to the Willits instruction because  
7 obviously Youngblood fails. There is no showing  
8 whatsoever of bad faith on the part of the Yavapai County  
9 Sheriff's Office.

10 Willits requires a couple of things. First of  
11 all, it requires a failure to preserve. Why is the  
12 sheriff's office out there taking literally hundreds of  
13 photographs of these tracks and footprints? Why are they  
14 doing that? They're doing that so that they can preserve  
15 that evidence. They thought that they were preserving  
16 that evidence when they did that.

17 They have since learned, as they candidly  
18 admitted in their interviews, particularly Detective  
19 Winslow, I guess I should of casted these things. I now  
20 do that, but I didn't do that in this case because he  
21 didn't know better. He now knows better. So they did  
22 their best at the time to preserve this scene.

23 Admittedly it was very inadequate but we have  
24 photographs that are usable to the extent that they are  
25 usable by the State and the defense. The same photographs

1 that depict footprints that don't match the Defendant.  
2 Seems to me that doesn't prejudice the Defendant. Seems  
3 to me it doesn't point out in some fashion that the  
4 Defendant is guilty in this case. Seems to me it leaves a  
5 rather large question mark about who was out there behind  
6 the Bridle Path residence.

7 That doesn't seem to me to rise to the level  
8 necessary to demonstrate that the sheriff's office really  
9 prejudiced the Defendant in this case and, therefore, the  
10 defense should get a Willits instructions on failure to  
11 preserve evidence.

12 Similarly with the tire tracks, we have tire  
13 tracks that are similar to millions of bicycle tires and  
14 there's been no showing, by the way, that even if some  
15 sort of terrific castings were made of those tire tracks,  
16 that these dissimilarities would be apparent.

17 We have sand out there that is loose, kind of  
18 a geological formation, so to speak, and not very  
19 susceptible to any kinds of prints at all. We were  
20 extremely fortunate to a certain degree in this case that  
21 there was a recent rain storm and that there were prints  
22 out there at all or at least discernable prints because  
23 normally speaking as the repeated visits to the scene  
24 demonstrated, cattle and hikers and bicyclists and all  
25 kinds of things go tramping through that area and there

1 are prints, sure, but not of a discernible nature, not  
2 usable for any kind of a purpose. This just happened to  
3 be a time when there was a very recent rain storm the day  
4 before and these were the only tracks that were observed  
5 by the officers out there.

6 Now, Mr. Sears suggests that, well, they  
7 should of gone out -- way out that way and way out that  
8 way and way out that way, and found other prints if there  
9 were any out there. Well, as they were walking along out  
10 there they did look out to the north and to the east, but  
11 they didn't see any other prints and that was the candid  
12 statement by the tracker out there. She didn't go far  
13 away and search for other prints. She didn't go out  
14 behind the bushes and look for other prints admittedly so  
15 but she didn't see any other prints in the area.

16 This is sort of, I would suggest, Judge, kind  
17 of, unfortunately a common sense approach, if you will,  
18 and a lack of expert approach to tire tracks and  
19 footprints. They saw tire tracks and footprints in the  
20 area. They followed the ones they saw. They didn't see  
21 any others in the area and I would point out that Teresa  
22 Kennedy you can see there went at least a mile and a half  
23 out to the northeast and didn't cross any other prints on  
24 the way. So there was at least some kind of a search  
25 going out that way.

1 I would suggest, Your Honor, that first of  
2 all, Youngblood is not applicable here because there is  
3 absolutely no showing of bad faith whatsoever. In fact,  
4 the way that this footprint and tire track investigation  
5 was conducted, it's equally damaging to the State as the  
6 Defendant.

7 And then, secondly, because of the way it was  
8 conducted, there is no prejudice whatsoever to the  
9 Defendant and part of it exonerates him. Thank you.

10 THE COURT: Thank you. Mr. Sears.

11 MR. SEARS: You know, if I thought for a  
12 second, Your Honor, that Mr. Butner would make that  
13 argument to the jury, we could all go home, couldn't we?  
14 That this evidence, which by the way, whenever in past  
15 hearings we have said there is no physical evidence that  
16 ties the Defendant to the scene, it's always pointed to by  
17 the State and they say, oh, yes, tire print and footprint  
18 evidence. Always.

19 What I think instead of the State conceding  
20 that there's now reasonable doubt about Mr. DeMocker's  
21 guilt based on the one piece of physical evidence they  
22 have clung to in this case. I think we have a different  
23 problem. I think we have the possibility -- just like the  
24 DNA results that don't go their way, that they want to say  
25 are inconclusive, could be Mr. DeMocker. What's to

1 prevent the State unless we step in today from arguing and  
2 inferring to the jury could be DeMocker. Could be  
3 DeMocker. Footprints could be DeMocker.

4 Just because we didn't find his shoes prints,  
5 just because we can't tell what size they are, just  
6 because we don't know what shoes they are, could be  
7 DeMocker. Could have thrown away his shoes. Could have  
8 burnt his shoes. Could of have had other shoes. They  
9 could be hidden.

10 They could be thrown out here someplace on the  
11 deep well ranch in a pile -- a burning pile with the golf  
12 club and the overalls and the gloves and the bloody  
13 clothes and the other things that Mr. Ainley, the previous  
14 prosecutor, speculated about in this case, that's what's  
15 wrong with their case. That's how you presume prejudice.  
16 That's how you presume bad faith.

17 Once again, we heard the State say, we were  
18 just doing the best we can. This is Yavapai County. This  
19 is what you get in a crime scene investigation. The  
20 county attorney's office had no difficulty calling a lab  
21 and getting these protocols and turning them in around in  
22 disclosure to us.

23 It is inconceivable that the Yavapai County  
24 Sheriff's Office standard of care should be, whatever they  
25 think, they're doing the best they can. We thought we

1 were doing something. This is a first degree death  
2 penalty murder case. The law and the public and the  
3 citizens of this county and Steven DeMocker and his family  
4 deserve better than the sheriff's office.

5 In this case the State hangs its hat in large  
6 part on this piece of evidence. Interestingly they have a  
7 story to tell here that adopts the parts of  
8 Mr. DeMocker's statements to them that they have to do.  
9 They have to have Mr. DeMocker up on Rainmaker with his  
10 bike. They have to have him on a bike to begin with  
11 because they want to have these bike track impressions  
12 over here on his bike. They can't have him on foot. They  
13 can't have him in a car. He has to be on his bike. So  
14 they have him riding his bike down to the scene down on  
15 Glenshandra.

16 Magically, levitating in the air over the  
17 fence with his bicycle, some how, I don't know what.  
18 Throwing it, picking up here, and either leaving  
19 footprints or not. First place, where they don't even  
20 agree with themselves, Winslow and Kennedy, about whether  
21 there are shoe prints impressions associated with these  
22 bike tire impressions, and then walking around here coming  
23 over the fence going in the house and killing his former  
24 wife in this case.

25 That is the center piece of their case

1 because as they have said time and time again it's the  
2 only physical evidence. There is to be sure no murder  
3 weapon. No DNA. No blood. No fingerprints. No  
4 confessions. No eyewitnesses to Mr. DeMocker other than  
5 Miss Johnson, the lovely lady who saw somebody on a  
6 bicycle and described a person on a bicycle that did not  
7 match in any way Mr. DeMocker and could not say with any  
8 clarity what time she saw this person going by on a bike  
9 and was interviewed weeks and then months after the  
10 events.

11 So this is it. This is today, January 14th,  
12 2010. The time to look at this piece of the State's case.  
13 Why isn't this Youngblood? Why isn't this a Youngblood  
14 case?

15 All the State can say in response is we were  
16 doing the best we can and now that we're doing the best we  
17 can and we're nice people and we just think we're doing  
18 our job, that's not bad faith. That's the ah shucks  
19 argument, and that's offensive to the people in this  
20 courtroom and should be, and it should be offensive to the  
21 sheriff's department and the hardworking people in the  
22 sheriff's department that know better and try to do better  
23 every day than the job that was done here.

24 And the fact that Dan Winslow and Teresa  
25 Kennedy are hard working nice people does not excuse what



1 they failed to do in this case because they knew better,  
2 and if they didn't know better, the State's suggestion,  
3 which is a very strange one, is how would they even know  
4 that if they didn't know what they were doing. If they  
5 didn't know what they were doing, they wouldn't know that  
6 somebody else would have to come.

7           Any police officer, much less the ones with  
8 experience, I think Dan Winslow said he had been a police  
9 officer since 1986. Any police officer knows this is  
10 scientific evidence. This is not a beer bottle on the  
11 side of the road. This is the be all and end all of their  
12 case. This is the murderer coming to the crime scene by  
13 their theory in this case and to suggest that because they  
14 didn't understand this was scientific evidence and needed  
15 to be preserved scientifically, then everything else flows  
16 from that and there's really no problem here, not even a  
17 problem that would rise to the level of a Willits  
18 instruction.

19           This being the physical evidence that the  
20 State has, what can we do, and what should be done here  
21 today about this physical evidence in a way that the State  
22 should be allowed to present it at all? I submit that a  
23 serious argument can be made and the Court should  
24 seriously considering dismissing this case for this  
25 failure.

1           This was -- in the litany of mistakes that  
2 Mr. Butner has referred to obliquely in this case and that  
3 we will refer to directly in this case and directly to the  
4 jury. In the litany of all of the things done wrong in  
5 case, this is the worse. This is the worst because this  
6 is what they relied on and this has nothing to do with the  
7 case and we will never know now who made these bicycle  
8 tire impressions and whose shoe prints this is.

9           We know from the GPS download precisely where  
10 Teresa Kennedy walked and I defy anybody to stand on any  
11 of these spots and see more than a few yards away. This  
12 is a particularly wooded area. You've see the aerial  
13 photos. You can see the trees. It is not a straight  
14 shot. It's ridiculous to suggest to us and offensive to  
15 suggest to us that they really discharged their duty to  
16 investigate this by occasionally looking up to see if they  
17 saw any other tracks or impressions.

18           For all they know there is another set of  
19 bicycle tire impressions matching these that goes off for  
20 miles in this (indicating) direction and that there are  
21 other footprints that go off for miles in this  
22 (indicating) direction but they put the blinders on and  
23 said, this is all that's important, just this area because  
24 it is the part of the evidence in this case that fits with  
25 their unified theory of Steven DeMocker riding his bike in

1 and killing his ex-wife, going back getting his bike and  
2 riding back getting in his car, and going home.

3 That's the essence of their case here. If  
4 nothing happens as a result of this, if no Willits  
5 instruction is given in this case, if Youngblood is not  
6 seriously committed as a possible resolution to this case,  
7 then all of this will be for naught and the State will be  
8 allowed to go forward here in this case and argue as they  
9 please what this means.

10 And I can assure you that Mr. Butner, my  
11 friend and colleague, will not stand in front of the jury  
12 and be as dismissive of the sheriff's office and as free  
13 and willing to concede that the sheriff's office made  
14 mistakes as he is here today. He's doing that here today  
15 because he knows that's the truth but when this case goes  
16 in front of the jury, this will be back into their case,  
17 and this will be similar, and I don't know, similar, and  
18 plus I don't know could be Steve DeMocker, and a jury  
19 could disregard the instructions and convict Steve  
20 DeMocker and ultimately sentence him to death on this  
21 evidence that is wrong. The justice system demands more,  
22 Your Honor.

23 I ask that you seriously consider dismissing  
24 the case and if you can't get there, then I know that a  
25 Willits instruction is required by this. Thank you.

1 THE COURT: As a matter of evidence for me to  
2 rely on, are you relying on the testimony that was  
3 presented earlier as distinguished from your presentation  
4 here?

5 MR. SEARS: Yes, sir.

6 THE COURT: Obviously, you're not testifying?

7 MR. SEARS: That's right. I have not heard  
8 the State rise and suggest that I have misrepresented or  
9 misstated any part of what I said here today but you've  
10 also heard, Your Honor, in several different proceedings  
11 evidence that would support all of what I've just said  
12 here today.

13 THE COURT: Let me defer ruling on this for  
14 the time being. We have Mr. Fields and Commander Russell  
15 here. Do you need to change paper?

16 THE COURT REPORTER: Yes.

17 THE COURT: Do you need a break?

18 THE COURT REPORTER: Yes.

19 THE COURT: We'll take a quick break and I'll  
20 allow the court reporter to change paper. Let me see, can  
21 I have Commander Russell, Mr. Fields, Mr. Butner,  
22 Mr. Sears, briefly in chambers so we can at least get --  
23 and Mr. Hammond. Mr. Hammond inside too -- so we can  
24 briefly get an idea of where we're going with this.

25 MR. FIELDS: Captain -- can I suggest Captain

1 Ciscero?

2 THE COURT: Yes, certainly.

3 (Whereupon, a break was taken.)

4 THE COURT: We're continuing in the case of  
5 State versus Steven DeMocker. We have been joined by  
6 Deputy County Attorney Jack Fields. The attorneys are  
7 still present. Also, we've been joined by Commander  
8 Russell and Captain Cicero.

9 We had a discussion earlier this week about  
10 possible modifications of release conditions and in that  
11 context defense counsel sought some provision for  
12 Mr. DeMocker to be able to review the materials that are  
13 provided in his case in terms of discovery and defense  
14 preparation material for the trial.

15 I was advised by Deputy County Attorney Butner  
16 that there was no objection to some modifications,  
17 although there was opposition to the release of Mr.  
18 DeMocker under the conditions that defense had requested.  
19 There was proposal for providing him with additional  
20 access to his materials above and beyond what he's allowed  
21 in the dorms or cells of the Yavapai County Jail and the  
22 access that he has to those when he's in the Yavapai  
23 County Jail, and pursuant to that the Court invited an  
24 order to be prepared by the parties with approval as to  
25 form and content by Mr. Butner.

1 I received that and part of the Court's order  
2 and the Court's intention was to, in particular, when it  
3 concerned the request for a secure private telephone line,  
4 I invited the Yavapai County Sheriff and the Yavapai  
5 County Jail to provide some additional information about  
6 appropriate limitations on those matters.

7 So I entered an ordered. I did indicate that  
8 the sheriff -- the sheriff's office would have until  
9 tomorrow to report to me the reasons that they may wish to  
10 assert regarding the provision of the telephone line in  
11 the room and that sort of thing.

12 My understanding had been based on the -- the  
13 on record discussions that the sheriff -- the sheriff's  
14 office to that point in time was willing to provide a  
15 computer, a Yavapai County computer, and storage for --  
16 computer storage devices like compact disks and the like,  
17 to act somewhat of a librarian for Mr. DeMocker and they  
18 were willing, based on what I was told, to provide a  
19 secure and private room up at Yavapai County Sheriff's  
20 Office, Camp Verde Detention Center, for eight hours a day  
21 seven days a week. However, using their computer rather  
22 than the defense computer.

23 The defense suggested and I accepted that  
24 suggestion that it would be much easier to load up their  
25 own computer, provide attorney-client protection by a

1 security password rather than using the county's computer  
2 and I thought at least that much of the matter was settled  
3 and I have come to learn that it is not.

4 Mr. Fields, my understanding is that the  
5 sheriff's office is now opposed to doing what I was told  
6 they were going to do and that the limitations of what  
7 they're willing to do is, now, I believe, to provide such  
8 a secure room but to require all paper records, no ability  
9 to do the audio or video reviews.

10 Would you state what you would on behalf of  
11 your client for the record.

12 MR. FIELDS: As far as the documents I -- and  
13 I do want to apologize to the Court and I believe that  
14 Mr. Butner was giving information in good faith. After  
15 consideration of the Court's order, though, at the highest  
16 level of the sheriff's office they just have made a  
17 decision they can't live with it, and I do apologize to  
18 the Court, the defense, and to Mr. Butner for having to  
19 take this position.

20 However, having said that, they are willing to  
21 offer a some privacy to him in order to deal with hard  
22 copy records of paper records. We have not discussed the  
23 audio or the video. We should be able to come to some  
24 kind of accommodation but the way that the order is  
25 drafted with essentially free access to a computer without

1 any kind of monitoring and with electricity, the sheriff  
2 is taking the position that that represents a serious  
3 security and safety risk to the jail and he is not willing  
4 to concede to that at this point.

5 THE COURT: So my understanding is that the  
6 parties would seek a hearing in connection with the  
7 issuance of such an order as been proposed or the  
8 limitations on such an order and possibly revisiting the  
9 issue of modification of release conditions?

10 MR. FIELDS: Well, I believe that it's  
11 probably -- possibly revisiting the issue. I cannot speak  
12 to the release conditions, that is for Mr. Butner. I will  
13 speak to the issuance of an order of this nature that --  
14 the kind that the sheriff would be compelled to obey. We  
15 believe that the Court would need to find that there is a  
16 series of an ongoing constitutional violations upon  
17 Mr. DeMocker and that would justify the interference with  
18 a constitutional officer's statutory duty to manage his  
19 own jail.

20 That's a fairly high standard and I think this  
21 it's probably going to take more than just evidence. I  
22 think that I would like to see a briefing of law from the  
23 defense outlining not only the evidence that they intend  
24 to support but that would support this but also their  
25 statement of why the law is applicable in this particular



1 -- under this particular sets of circumstances.

2 THE COURT: What is your estimate, if you have  
3 one, of the length of the hearing that might be necessary  
4 and including an expression of the security concerns and  
5 what they are if you intend to do that?

6 MR. FIELDS: Well, Your Honor, I believe that  
7 the burden is on the Defendant to show a constitutional  
8 violation.

9 THE COURT: Oh, I don't disagree, but if  
10 you're intending to add some way of testimony and evidence  
11 with regard to what limitations there ought to be -- how  
12 long?

13 MR. FIELDS: Our portion would probably be,  
14 oh, two hours -- two to three hours.

15 THE COURT: For the total?

16 MR. FIELDS: For our portion, yes.

17 MR. SEARS: Well, Your Honor remember, that  
18 this was a part of a motion to reexamine Mr. DeMocker's  
19 release conditions and we argued for his release as the  
20 appropriate way -- -

21 THE COURT: I remember that.

22 MR. SEARS: -- to remedy any sixth amendment  
23 violation. The order signed by the Court says, in  
24 order to secure Defendant's rights under the  
25 sixth amendment to the effective assistance of

1       counsel --

2               THE COURT REPORTER: I'm sorry, counsel.

3               MR. SEARS: I'm sorry. In order to.  
4       secure Defendant's rights under the sixth amendment  
5       to effective assistance of counsel and to  
6       meaningfully assist in his own defense, the Court  
7       hereby orders and then enters these orders.

8               The State through Mr. Butner approved the  
9       signing of this order and the Court entered it.

10              What we have here is something different. We  
11     have a finding of the Court, based upon the record and  
12     based upon the arguments and written motions of counsel  
13     that absent these modifications to these conditions of  
14     confinement               Mr. DeMocker's sixth amendment  
15     rights will be violated.

16              What we have here today is a sheriff who is  
17     indicating through counsel from the same office that has  
18     approved this order that he will not obey a lawful order  
19     of this Court. A Court that has jurisdiction to enter  
20     these orders to protect the rights of the accused.

21              So what we have is a head-on collision between  
22     the idea that the sheriff is in control and answerable to  
23     no one for the safety and security of the people remanded  
24     to him for custody with what the Court has already found  
25     to be the sixth amendment right of the Defendant.

1 I would suggest that the burden is not on  
2 Mr. DeMocker to go forward. We have an order in place.  
3 The burden is on the sheriff to show cause why he should  
4 not be subjected to the orders of this Court. That's how  
5 this works.

6 This Court and superior Courts throughout the  
7 State of Arizona enter orders on a regular basis directing  
8 departments of government to do things and this is  
9 something that's clearly within the power of the Court.  
10 The Court clearly has the ability and the responsibility  
11 to protect constitutional rights of all people who stand  
12 accused before it in this case.

13 What I am concerned about is this shifting of  
14 positions and I understand and appreciate that Mr. Butner  
15 came and represented to the Court what he had been told  
16 and I understand that Mr. Fields is here representing the  
17 Court what he has been told about the circumstances. The  
18 decision ultimately is with you, not with the sheriff, not  
19 with me, not with Mr. Butner, not with Mr. Fields.

20 The decision is the Court's in this case but  
21 to delay this any longer, to require a round of briefs or  
22 a hearing where we have to put on evidence or we have to  
23 proof something to establish what has already been found  
24 only exacerbates and delays and magnifies the ongoing  
25 violation of Mr. DeMocker's constitutional rights in this

1 case.

2 This is a motion for his release. If the  
3 sheriff won't comply with the Court order, we ask you  
4 again to release Mr. DeMocker so that he can be of  
5 meaningful assistance to his team and have access to his  
6 case and I don't know that we need to hear even, really  
7 frankly, from the sheriff.

8 If the sheriff says he won't do this and  
9 that's their position and that won't change and that's  
10 what I'm hearing from counsel, and that's what we talked  
11 about off the record in chambers, if the sheriff's won't  
12 do it, the decision can be made on that record, because  
13 there's nothing in-between -- the Court knows that there  
14 is nothing in-between for consideration that would  
15 effectuate and preserve Mr. DeMocker's rights.

16 We know that giving him access to his paper  
17 discovery on a hit or miss bases without a telephone,  
18 without a computer, will not solve this problem because  
19 that's not -- this is not a case with a few hundred pages.  
20 This is a case with tens of thousands of documents, audio  
21 files, video files. The only way it we could be managed  
22 -- the only way that we can manage the case, the only way  
23 that the State can manage the case is through the use of  
24 computers and all of this sophisticated management  
25 programs.

1           You can't expect Mr. DeMocker to have  
2 meaningful access to his materials, bankers box by bankers  
3 box, in this case, that can't happened, and the Court  
4 knows that. I'm sure the Court knows that in this case.  
5 We shouldn't waste anymore time.

6           Releasing Mr. DeMocker is the simple logical  
7 way to do this. The sheriff has the right to refuse to do  
8 this but there has to be a way out of this. There is no  
9 reason to go and listen to what the sheriff says and make  
10 further changes to this order. This was a solid, well  
11 thought out reasonable order agreed to by the State.  
12 Thank you.

13           THE COURT: Mr. Butner.

14           MR. BUTNER: First of all, to clarify for the  
15 record, Judge, I approved it as to form and content but,  
16 secondly, there weren't findings from my recollection, and  
17 I was here, there weren't findings made by the Court,  
18 rather, it was simply recited that this was done to secure  
19 Defendant's rights under the sixth amendment to the  
20 effective assistance of counsel.

21           There were no findings made. No evidence  
22 presented that lead the Court to conclude that his sixth  
23 amendment rights were being deprived as a result of this  
24 situation, rather, this was at least, as I understood it,  
25 an attempt to assist and better the Defendant's situation

1 in the jail so that he could more effectively exercise his  
2 sixth amendment right.

3 I think that we do need to have such a  
4 hearing and I don't think we have had that kind of a  
5 hearing in this case, unless I misunderstood what was  
6 going on, and I'm the person that signed this in terms of  
7 approving this to form and content.

8 THE COURT: Well, you signed it based on  
9 representations that had been made to you by somebody at  
10 the sheriff's office?

11 MR. BUTNER: Judge, I'm not backing away from  
12 that. I did. And you accurately set forth what those  
13 representations were but this order does go beyond what  
14 those representations were in both Paragraph 1 and 2 and,  
15 you know, I understand the Court was attempting to do the  
16 best that it could to help ameliorate the situation.

17 THE COURT: Well, and that was based on the  
18 representations that the Yavapai County computer could be  
19 used. I essentially was going along with what you were  
20 willing on behalf of the sheriff's office to provide based  
21 on what some representative from the sheriff's office told  
22 you they would do.

23 MR. BUTNER: I'm not disagreeing with what you  
24 just said, Judge.

25 THE COURT: I do not -- I believe that a

1 hearing is appropriate and I believe that the burden is on  
2 the defense still and I don't believe that the findings  
3 were made as to part of the order that was previously  
4 entered in terms of whether the Defendant's rights had  
5 already been affected.

6           It was rather an accomodation to attempt to  
7 secure his sixth amendment rights for him prior to the  
8 trial occurring in May and I agree with Mr. Sears that  
9 perhaps my alternative is to do some other modifications  
10 of release.

11           So I'm going to set a hearing with regard to  
12 this. I think I have Friday morning available next week  
13 on the 22nd and I'm going to set a hearing at 9 o'clock on  
14 the 22nd in connection with the reasons why the defense  
15 believes that sixth amendments are being impaired and  
16 affected in a negative way by the restrictions that the  
17 sheriff wishes to impose on the Defendant, and I'm open to  
18 suggestions for, again, remediating those issues without  
19 adversely affecting the security of the jail.

20           So I'll -- to the extent that the order  
21 requires forthwith compliance based on the representations  
22 made, I'll vacate that portion of the order and we'll  
23 consider what modifications, if any, to make to the order  
24 next week.

25           Anything else, Mr. Fields, that you think

1 that you need?

2 MR. FIELDS: Some indications of --

3 THE COURT: Check if you would please. 9  
4 o'clock on Friday. Make sure that that's available.

5 MR. FIELDS: The law in this area is fairly  
6 clear and it really hasn't been covered by the defense or  
7 by our office either and I think that some briefs to  
8 explain the --

9 THE COURT: I would appreciate any briefing,  
10 and if I can have that by Thursday morning, that would be  
11 much appreciated.

12 MR. FIELDS: Okay. I will.

13 MR. SEARS: If I could have a couple of  
14 minutes with Mr. Fields and talk about this because I'm  
15 not sure I'm going to get to speak with him again any time  
16 soon.

17 THE COURT: All right. You may. Let's take a  
18 brief recess again.

19 (Whereupon, a break was taken.)

20 THE COURT: Mr. DeMocker is still here with  
21 his three counsel and Mr. Butner is here for the State and  
22 Mr. Fields has departed.

23 Back on the issue of the Youngblood motion to  
24 dismiss or Willits instruction. I think in connection  
25 with this, Mr. Sears is correct, that I can rely on the



1 evidence as previously been presented to the Court in the  
2 Simpson Chronis hearings and to that end I would conclude  
3 that indeed there was an investigation that was conducted  
4 by the sheriff's office.

5           As part of that investigation there was an  
6 evaluation of areas exterior to the fence line of the  
7 Bridle Path house. There had been recent precipitation in  
8 the area so there were -- there was a cleansing of the  
9 pallet, so to speak, and as part of the investigation the  
10 police stated that they or the sheriff's office stated  
11 that they found some bicycle tracks in the area of the  
12 Kennedy residence off -- off to the north and east, off  
13 the dead end of Glendshandra out in the area where the  
14 ranch that belongs to the James' and the various sections  
15 of State land are to the east of former DeMocker/Kennedy  
16 residence.

17           I suppose that I'll disagree with the  
18 characterization that perhaps there were many other tracks  
19 out there from bicycles or other hikers. It seems to me  
20 there was an evaluation on that in an attempt to determine  
21 if there were additional tracks and the like.

22           Nonetheless a certain set of discreet tracks  
23 were found going off to the northwest from the Kennedy  
24 property off to the northeast from the Kennedy property as  
25 recited by Mr. Sears in his summary. There was a set of

1 bike tracks with the markings that were eluded to by  
2 Mr. Butner and witnesses in the various proceedings as  
3 well as Mr. Sears in his summary today.

4 In the vicinity there was some dispute in the  
5 record about whether there were footprints coincident to  
6 the bike, bike track marks, but there were a discreet set  
7 of shoe prints also in somewhat of a circular pattern  
8 going from the area where the bike tracks stop and then  
9 coming back in a pattern, and then somewhat of a  
10 rectangular or circular pattern and some evidence of  
11 footprints -- shoes prints within the yard.

12 There was not evidence of distinct  
13 identifiable shoe prints within the residence in blood or  
14 otherwise that I recall having been eluded to in the  
15 evidence. The inference from this information would be  
16 that someone came into the residence from behind the  
17 residence and it's -- one reasonable inference that could  
18 be drawn is that that was the person who killed  
19 Miss Kennedy.

20 The bicycle track marks may or may not be  
21 connected to those shoe prints. Nonetheless, there wasn't  
22 a preservation of the -- in a manner that would comply  
23 with the DPS preservation techniques for either the bike  
24 track marks or the shoe prints. There were efforts made  
25 at preservations by the sheriff's office and I recognize

1 the sheriff's office of the Yavapai County is a distinct  
2 operation from the crime lab or DPS itself.

3 I don't believe that bad faith has been shown  
4 on the part of the police which is part of the Youngblood  
5 requirements. Was there a failure to properly preserve  
6 evidence? It appears that there were efforts made to take  
7 photographs of the bike tread marks and it appears that  
8 there were efforts made to take certain photographs of  
9 some of the footprint marks, according to the summary,  
10 this even included some efforts at putting down known  
11 distant markers such as rulers or boxes or other things  
12 like that, that could identify them, the size of the marks  
13 and/or prints.

14 I think that the evidence is clearly  
15 potentially useful to the defense in the sense that it  
16 could show the presence of the person who entered the  
17 house if one were to make the inference that that is --  
18 that the person behind the house is the same one who was  
19 in the house and beat Miss Kennedy.

20 And it potentially could show that that was  
21 the person other than Mr. DeMocker. I can acknowledge it  
22 could show that it was Mr. DeMocker, but it is a  
23 potentially useful set of evidence that I think could have  
24 and probably should have been preserved in a better  
25 fashion than was actually accomplished by the Yavapai

1 County Sheriff's Office at the time.

2 I don't conclude that there was bad faith, as  
3 I said, but it appears to me that at least as regards to  
4 the shoe prints, that the -- that the appropriate remedy  
5 absent any additional information that is presented at  
6 trial would warrant a Willits instruction.

7 So at least with regard to the shoe prints,  
8 possibly with regard to the bike prints -- bike tire  
9 prints, a Willits instruction would appear at this time to  
10 the Court to be appropriate. I'll -- since we don't  
11 settle instructions until later in the case, I'll reserve  
12 the right to modify that ruling based on the evidence  
13 that, in fact, is presented in Court but at this time it  
14 would appear to me that a Willits instruction would be  
15 appropriate.

16 So I recognize it's somewhat of a contentious  
17 finding or an indefinite finding but I think that's the  
18 best I can do based on what I have heard.

19 Mr. Sears, Mr. Butner, any other  
20 clarification issues that either one of you have with  
21 regard to that?

22 MR. BUTNER: I don't have any questions on  
23 that, Judge, at this time.

24 MR. SEARS: No, Your Honor.

25 THE COURT: Okay. Good. Let's move on then

1 from the Willits. What is the next matter that you wish  
2 to take up?

3 MR. SEARS: I think if we could take up what's  
4 left of the 404(B) issue, Your Honor, I don't have any  
5 witnesses to call. I don't know whether the State has any  
6 witnesses to call on these remaining points, if they do,  
7 that might impact whether we can get this done by the  
8 close of business.

9 THE COURT: Any additional witnesses that you  
10 were intending to present, Mr. Butner, with regard to the  
11 remaining 404(B) matters?

12 MR. BUTNER: Not at this time, Judge, because  
13 as I explained I haven't been able to contact the one  
14 witness and the other witness, of course, we quashed the  
15 subpoena. So I don't really have any witnesses for that  
16 hearing. I would just draw the Court's attention to the  
17 record which, you know, you've already relied upon to some  
18 extent in making decisions on other motions at this time.

19 THE COURT: Mr. Sears, if you want to state  
20 objections to my taking judicial notice of what testimony  
21 has already been presented, you may do that, and make any  
22 other record that you wish to do.

23 MR. SEARS: Thank you, Your Honor. We had  
24 made an objection in an earlier proceeding to a proceeding  
25 that this would have live testimony, simply to preserve

1 that objection, I would renew it at this time.

2 Although I understand what the Court's ruling  
3 has been thus far, that the Court would allow the State to  
4 proceed by offering portions of prior recorded sworn  
5 testimony in this case but I just wanted to make it clear  
6 that our position is to the contrary as the State is  
7 required to present live witnesses, that our client has a  
8 sixth amendment constitutional right on this particular  
9 matter and that is violated by allowing something other  
10 than a live witness to present this evidence.

11 THE COURT: And as I indicated in chambers  
12 earlier I'll deny -- I'll overrule that objection and I'll  
13 allow the State to rely on evidence that has already been  
14 admitted so long as that evidence comes as it does from  
15 the Chronis hearing and Simpson hearings at which the  
16 Defendant was present and had an opportunity to  
17 cross-examination through you and the other defense  
18 counsel.

19 MR. SEARS: Your Honor, I understand there to  
20 be four of the eleven topics remaining for discussion,  
21 Numbers 3, 4, 5 and 6, is that your position?

22 THE COURT: That's my view also.

23 MR. SEARS: So if I could talk about Number 3,  
24 the possible use of the evidence that you heard about  
25 Defendant's computer searches prior to the death, that's

1 404(B) evidence and I would --

2 THE COURT: Before you do that, do you intend  
3 to put on any evidence which would contradict the evidence  
4 I've already heard?

5 MR. SEARS: No, sir.

6 THE COURT: Go ahead.

7 MR. SEARS: I was just prepared to argue this.  
8 Again, remembering why we are here and what for, and what  
9 404(B) is, it's character evidence and there is a  
10 difference, I think, that has to be considered here  
11 between the use of evidence about these computer searches  
12 for possible motive or one of the other 404(B) exceptions,  
13 and they use it as simply as impermissible character  
14 evidence, that the Defendant is a bad man, that he's a  
15 dangerous man, that he is a secret murderer, any of the  
16 other things that the State already has and would likely  
17 say about that, and remember that at the time that that  
18 evidence was put forth among the State's theories in this  
19 case was one related to an aggravator which the Court has  
20 now struck that this was a cold and calculated murder.

21 The State has said repeatedly in writing and  
22 in this courtroom that this was a rage killing, that it  
23 was a physical confrontation between the Defendant and the  
24 victim, that it was a violent attack, and all of the other  
25 things they said to support some of the other aggravators.

1           And then at the same time they say, but a  
2 number of months before he was using his computer to find  
3 ways to murder someone without being detected using poison  
4 gases or other devices. If you remember the evidence that  
5 we heard so far about this, first, some of these searches  
6 turned out to be on cross-examination, not at all what  
7 they appeared to be just from the threshold information  
8 about the titles.

9           You remember the story about even the  
10 smallest things can attack. A family joke. And how to  
11 kill someone search being connected to a website that was  
12 full of jokes in this case. There is absolutely no  
13 evidence whatsoever that with respect to the actual death  
14 of Carol Kennedy that poison gases or any aspect of what  
15 was in these searches was applied by Mr. DeMocker to the  
16 death of Miss Kennedy.

17           In contrast she was talking on the phone to  
18 her mother in her own home when she was attacked,  
19 according to the State's theory, in a brutal way with  
20 something that was around the home. The computer searches  
21 were themselves on -- in a folder in the My Document  
22 portion of Mr. DeMocker's laptop computer entitled Book  
23 Research.

24           There was evidence presented to you about  
25 Mr. DeMocker also looking at web sites that were found and



1 you remember them being shown to you about writing mystery  
2 novels. And one particular website that was a compendium  
3 of resources and information for people who wanted to  
4 write detective or murder mysteries and get them published  
5 in this case.

6 So the State's first burden is to  
7 extrapolate from the evidence we have the fact by clear  
8 and convincing evidence that Mr. DeMocker committed these  
9 acts. The State has not and cannot for sure say anything  
10 more than these were found on Mr. DeMocker's computer.

11 They have not presented any evidence that  
12 other people could not have used the computer, that those  
13 searches were done by somebody else. That's sort of a  
14 fundamental issue but even assuming that the State clears  
15 that hurdle, the use by them to dirty up Mr. DeMocker as  
16 opposed to connect them to the crime, the use by them is  
17 simply to dirty Mr. DeMocker up in an impermissibly way by  
18 saying he's a person of bad character, and only a person  
19 of bad character would do such a thing is what 404(B)  
20 would prevent in this case.

21 I think that we have to be careful in  
22 analyzing this to say that if Mr. Butner were to say now,  
23 oh, this goes to motive in this case, could it really ever  
24 be said to go to motive in this case or preparation or  
25 plan because the crime is so distinctly different and

1 unlike and distinguishable from what's on these computer  
2 searches as to make that connection impossible.

3           There's nothing about these computer searches  
4 that carries forward into the way that Carol Kennedy dies  
5 in this case. And so the net effect of that is that if  
6 permitted to go forward on the basis of somehow this  
7 happened and that it is not excludable under 404(B) allows  
8 the State in the guise of presenting evidence that  
9 Mr. DeMocker was planning this and was thinking about  
10 killing somebody, and doing those other things, to present  
11 character evidence of a bad nature about Mr. DeMocker  
12 without being able to connect it to what happened in this  
13 case.

14           I think that the State seized upon this  
15 computer information early on because they had a theory of  
16 the case that has since shifted and I think that they see  
17 or must see or should see the disconnect logically between  
18 saying on the one hand that it's a rage crime committed by  
19 a desperate person who was pushed to the breaking point of  
20 a perfect storm, and all of the other trappings that they  
21 put on the crime, I guess, the person sitting in the quiet  
22 of their own home typing on their laptop looking up for  
23 ways to kill somebody in an undetectable way.

24           The State that has made much of the idea that  
25 Mr. DeMocker was toying with the idea of ordering carbon

1 monoxide gas in this case, that he used an employee  
2 identification number. The State has never proved that  
3 because they know the answer is that he did not, that  
4 Mr. DeMocker never actually ordered any of that stuff.

5           And if he was researching a book and if part  
6 of the premises that you can extrapolate out of these  
7 various searches was killing people in an undetectable  
8 way, then researching the idea of just how easy it is to  
9 order such things online could reasonably be assumed to be  
10 part of that process and, in fact, if we had to go there,  
11 that's what the evidence would be in this case.

12           But we're here today to look at 404(B) and  
13 whether that could possibly be stretched and massaged and  
14 reshaped to be permissible 404(B) evidence and because of  
15 what we now know all of these months downstream about what  
16 the State's theory is about how the crime was committed  
17 and how that does not connect up in any meaningful way to  
18 these computer searches, I would suggest that it is  
19 inappropriate under 404(B) for the State to be permitted  
20 to simply throw this information out to the jury because  
21 in doing so they are only trying to communicate to the  
22 jury that this is a very bad man and not offered anything  
23 that is probative of any actual fact connected to the way  
24 in which this crime was committed. So for that reason I  
25 think that our motion to preclude under 404(B) this

1 evidence is appropriate and should be granted.

2 THE COURT: Do you want to address these in a  
3 discreet way like that, probably would be preferable?

4 MR. BUTNER: I think so, Judge, it would be.

5 THE COURT: Go ahead then, Mr. Butner.

6 MR. BUTNER: Judge, let's just assume for a  
7 moment that whomever killed Carol Kennedy thought about  
8 killing Carol Kennedy beforehand and that doesn't require  
9 some tremendous amount of leap of faith.

10 Whomever killed Carol Kennedy, and the State  
11 would submit that the evidence indicates that it's the  
12 Defendant -- at any point in time during that beating that  
13 person had an opportunity to stop and we have no evidence  
14 to indicate that the first blow was the fatal blow.

15 Well, if you take a step further back from  
16 that, that might not have been the first method that the  
17 killer thought to use in killing Carol Kennedy. Months  
18 before this homicide Mr. DeMocker was researching in his  
19 computer how to kill somebody and make it look like an  
20 accident. How to kill somebody and not get caught. How  
21 to kill somebody and leave, in essence, no evidence that  
22 it was a homicide.

23 And his method at that point in time was to  
24 use carbon monoxide gas, and he went so far at that point  
25 in time to get an employee -- employer identification

1 number, according to the records, documents in and  
2 connection, so to speak, in his computer.

3 He went so far as to research where to get  
4 carbon monoxide but obviously he didn't carry out the  
5 homicide in that fashion, that does not mean that he  
6 wasn't thinking about killing someone at that point in  
7 time and it's a reasonable inference that the person that  
8 he was thinking about killing was Carol Kennedy.

9 And it's no stretch -- we're not trying to  
10 say that Mr. DeMocker is a person that had bad character  
11 by presenting this evidence. We're presenting this  
12 evidence to show that it was not a mistake. It was not an  
13 accident, that there was a plan, that there was  
14 preparation, and that there was motive.

15 And we have motive established with the  
16 financial documents and we have this evidence to  
17 demonstrate that, although this may have been a rage  
18 killing and, of course, we've had motions in limine saying  
19 that people that have opined that already cannot offer  
20 those kinds of opinions in evidence at trial, that  
21 although this may have been a rage killing because of how  
22 brutally Carol Kennedy was murdered that doesn't mean that  
23 there wasn't a plan to kill her beforehand.

24 This is evidence that we have an ongoing  
25 situation that exists between the Defendant and Carol

1 Kennedy where the Defendant is going to resolve this  
2 situation by killing Carol Kennedy, and ultimately that's  
3 what happened in this case. It's just that he didn't use  
4 carbon monoxide.

5 I would submit that this evidence is quite  
6 clear, quite convincing, that he was contemplating killing  
7 somebody. He didn't type in Carol Kennedy's name right  
8 there besides the carbon monoxide. He didn't type in  
9 anybody's name. He just had records in his computer that  
10 indicated that he was planning on killing somebody and  
11 making it look like an accident or killing somebody in a  
12 way that he wouldn't get caught, and I would submit that  
13 this is perfectly acceptable evidence under Rule 404(B),  
14 that this is the kind of evidence that in a case like this  
15 is contemplated as being acceptable into evidence under  
16 Rule 404(B) thank you.

17 THE COURT: Apart from the obtaining of an  
18 employee identification number and in that circumstance  
19 where it's in Mr. DeMocker's name what about the comment  
20 by Mr. Sears that other people may have had access to the  
21 computer?

22 MR. BUTNER: That is a possibility. Other  
23 people may have had access but that's Mr. DeMocker's  
24 computer. There isn't evidence that other stuff on there  
25 came from someone else other than Mr. DeMocker. The

1 evidence, as I understand it, is that all of this stuff on  
2 there is Mr. DeMocker's.

3 And in regard to the comment that this is  
4 evidence for him to write a book. There's no evidence  
5 whatsoever of any booking written in that computer, not a  
6 portion of any book at all written by Mr. DeMocker.

7 THE COURT: Thank you. Mr. Sears, any  
8 additional comments on that?

9 MR. SEARS: Thank you, your Honor. And,  
10 again, looking back at the idea of 404(B), the purpose of  
11 404(B) is to prevent the government in a criminal  
12 prosecution from arguing that if a person has demonstrated  
13 bad character or committed some bad act, that they are  
14 more likely then to have done what they are charged with  
15 as a result, that's propensity evidence, and that's  
16 exactly what the State is arguing here because even now  
17 they cannot connect in a direct way the actual acts  
18 themselves, the looking up of these things to the murder  
19 other than to say Mr. DeMocker must have been thinking  
20 about killing somebody, that person must have been Carol  
21 Kennedy, and even though the killing doesn't implicate any  
22 of the things that he's looking for in the internet, the  
23 fact that he did these things a number of months before is  
24 proof of intent or opportunity or plan of preparation.

25 They are, if anything, proof of intent, plan

1 or preparation for something that never happened in this  
2 case. What happened in this case was something different.  
3 Mr. Butner has said that it's obvious from the facts of  
4 the case that whoever killed Carol Kennedy thought about  
5 it beforehand.

6           It is at least in our view equally likely that  
7 the killing could have been an intruder. We've now heard  
8 bits and pieces of this case. The court has observed here  
9 this afternoon that the foot -- the shoe print impressions  
10 could have been from somebody entering the property. That  
11 person could have been intending to commit a sexual  
12 assault and was interrupted. That person could be  
13 intending to burglarize, commit a home invasion crime. It  
14 could have been more than one person.

15           So what the State wants you to permit them to  
16 do is take this evidence for what it is, which is evidence  
17 of particular acts of the Defendant which they are going  
18 to argue are bad, these are not benign acts. These are by  
19 the State's only argument today acts of a murder and  
20 although they have no way to connect those to what  
21 happened to Carol Kennedy, allow them to put that out to  
22 the jury and argue that if he did these things then he  
23 must be the murderer because only a murderer would have  
24 done these things, that's character evidence, that's prior  
25 act evidence in this case.



1 Plus, as the Court has now observed they have  
2 this problem of proving by clear and convincing evidence  
3 that those key strokes were entered by Mr. DeMocker in  
4 this case. They have not come forward with such evidence  
5 presumably because nothing exists in this case.

6 The computer searches may have had a place in  
7 the State's theory of the case at one time but I think  
8 that based on the Court's prior rulings based on the  
9 evidence today and based on what must be preserved as the  
10 logical inconsistency between this behavior and the way in  
11 which Carol Kennedy died, I think that time has come and  
12 gone.

13 And letting the State bring this evidence on  
14 is just an opportunity, once again, to dirty up  
15 Mr. DeMocker and force him to defend and explain, at which  
16 point the State says isn't that convenient Mr. DeMocker  
17 seems to have an explanation for everything in this case,  
18 and that is something that Mr. DeMocker should not be put  
19 in a position of having to do in this case.

20 These computer searches now clearly have  
21 nothing to do with this murder. They are not admissible  
22 under any exception as to 404(B). They are simply bad act  
23 evidence. Thank you.

24 THE COURT: All right. The next item.

25 MR. SEARS: The next two, Your Honor, Number 4

1 and 5 I think based on the comments of counsel earlier  
2 today seem to be related. If I understand what the  
3 State's position is is that the sum total of their bad act  
4 evidence about false and misleading statements to the  
5 Court and his divorce and alleged hiding of assets all  
6 revolve around the testimony of Mr. Echols interpreting  
7 this report of Mr. Casalena.

8 That Mr. DeMocker took a position in the  
9 divorce about his so-called Book of Business and that that  
10 position was false. It was misleading to the Court and  
11 that it constituted hiding an asset, the asset being, the  
12 true value was the Book of Business.

13 Let me quickly recap what the evidence is on  
14 that, Your Honor. The evidence is that on advise of  
15 counsel and for good reason, Mr. DeMocker took the  
16 position based upon both the law and particularly the  
17 facts of his employment with UBS to say I do not have a  
18 Book of Business that has a value. I do not own my  
19 customers. UBS owns my customers. When I leave UBS I  
20 don't get to take them with me unless they come  
21 voluntarily. I don't own them and I don't get paid for  
22 them. Therefore, there is no value.

23 Craig Curry testified at great length and  
24 rather convincingly, we think, that the appropriate way to  
25 handle treating this is to say that it has some value but

1 its is intellectual property. It's his skill and  
2 experience and good will and that is reflected in the  
3 amount of income on his financial statement not upon  
4 calling it a hard asset on some balance sheet.

5 That's -- and, by the way, I think we also  
6 pointed out, as I recall, that literally the form on which  
7 this was disclosed to the Court in the divorce didn't ask  
8 for that information. It didn't ask him for that  
9 information but he provided it any way.

10 The evidence was that Mr. DeMocker didn't hide  
11 anything. He simply didn't think that it existed. He  
12 explained he disclosed all of the information about his  
13 financial arrangements with UBS. He disclosed all the  
14 assets he had. He simply took a position upon which  
15 apparently reasonable accounting professionals can  
16 disagree. Mr. Echols and before him Mr. Casalena kept  
17 saying, oh, no, you're wrong. This Book of Business has  
18 value.

19 Look at what happened. What happened was when  
20 the divorce case came to trial on May 28th, 2008, this was  
21 an issue, A, Mr. Casalena was no where to be seen, not in  
22 the building, not ready to testify on behalf of Carol  
23 Kennedy that there was a Book of Business that needed to  
24 be divided. He had filed a report that said draft on it,  
25 that the State offered as an expression of his opinion.

1           There was a motion filed in the divorce case  
2 to strike that report as being untimely. It was faxed up  
3 the day before trial in this case but most importantly,  
4 the case didn't go to trial. It was settled and you have  
5 seen the divorce settlement between the parties where  
6 Mr. DeMocker is awarded by agreement of the parties -- and  
7 counsel, every one signs -- any value to his Book of  
8 Business. A pretty clear and unambiguous expression on the  
9 part of Miss Kennedy and her attorney that there is no  
10 value to the Book of Business.

11           Now, there was some discussion about this  
12 retiring agents agreement and the State waived that around  
13 and poor Mr. Echols tried to talk about it. You would not  
14 admit that has an exhibit because it was never signed by  
15 Mr. DeMocker in this case. It didn't apply.

16           Additionally on its face, its not a Book of  
17 Business. It's simply a way in which UBS hoped to keep  
18 retiring agents loyal to the company and on board to  
19 transition over a period of time their customer base to  
20 the next agent picking up those customers by paying them a  
21 decreasing amount of money overtime to be full-time  
22 consultants to the next guy that as the Book of Business.

23           To say that's it's hiding an asset or a false  
24 and misleading statement in the divorce case, not to  
25 mention all the hyperbole and hog wash from Mr. Casalena

1 and Mr. Echols adopting it, and that this was perjury, and  
2 that Mr. DeMocker was going to go to jail, and all of the  
3 other things that this Court has rejected in striking the  
4 witness elimination aggravator in this case, is exactly  
5 the kind of 404(B) evidence.

6 The State wants to say that Mr. DeMocker was a  
7 cheat and a liar and a defrauder of the Court and his wife  
8 and in his divorce case. There is no evidence whatsoever.  
9 If that is it, then I think that this Court has already  
10 made some decisions about what that evidence may mean and  
11 does not mean and above all it does not mean that  
12 Mr. DeMocker made a single false statement or a misleading  
13 statement to the Court or that he was hiding anything. He  
14 was open and transparent and he took his possession and  
15 ironically he prevailed.

16 Miss Kennedy through her attorney tossed in  
17 the towel on that one and to say that the State now should  
18 be able to go to the jury in this murder trial and say  
19 that Mr. DeMocker did all of these things is exactly what  
20 404(B) is designed to prevent.

21 It is evidence of bad character designed only  
22 to dirty up Mr. DeMocker and to tie him to this theory  
23 that the State continues to advance that he's a liar and a  
24 manipulator, an all around bad person. This evidence in  
25 so far as 404(B) is concerned should be precluded from

1 this case.

2 There is nothing there. There never was  
3 anything there and to simply repeat these words over and  
4 over again does not make them true. Thank you.

5 THE COURT: Mr. Butner.

6 MR. BUTNER: Well, there's one thing that we  
7 agree on and that is that the Defendant was awarded the  
8 Book of Business in the final decree. The value of the  
9 Book of Business that, as Mr. Sears states, then he goes  
10 on to say that it had no value which, of course, belies  
11 the award, doesn't it? It makes no sense to say it has no  
12 value when it was awarded to the Defendant.

13 He did hide the asset and the sworn financial  
14 affidavits are the clearest evidence of that. The Book of  
15 Business is not mentioned in those. The liabilities  
16 associated with the Book of Business and those employee  
17 forgivable loans are referenced but there is no value  
18 whatsoever assigned to the Book of Business. It is  
19 entirely omitted.

20 If you'll recall the testimony of Mr. Curry he  
21 had to reluctantly admit that the Book of Business was, as  
22 compared with an intangible -- or rather with a tangible  
23 asset, it was an intangible asset but nevertheless -- and  
24 I'm using the word he stated -- it was an asset and an  
25 asset has value and it should have been referenced on the

1 financial statements and that was the testimony of CPA and  
2 certified fraud examiner Mr. Echols, quite clearly, and  
3 yet it was not. It was entirely omitted.

4 The way that Mr. DeMocker --

5 THE COURT: It was entirely omitted from --

6 MR. BUTNER: From those financial statements.

7 THE COURT: From the financial statements  
8 submitted in Judge Mackey's court?

9 MR. BUTNER: Yes. Those -- the financial  
10 statements and then the amended one. Neither one of them  
11 referenced the Book of Business.

12 THE COURT: So the other act the State would  
13 like to have admitted is the existence of the financial  
14 affidavit in the court proceedings, the failure in that  
15 affidavit to include some identifiable connection to the  
16 Book of Business as an asset?

17 MR. BUTNER: Correct.

18 THE COURT: But not to show that Miss Kennedy  
19 was unaware of that because it was part of the settlement  
20 agreement?

21 MR. BUTNER: It was at the time of settlement  
22 and -- but it was a bone of contention, so to speak, as  
23 raised by Mr. Casalena and apparently Miss Kennedy was  
24 aware somehow of its existence but she capitulated. He  
25 wore her down.

1 THE COURT: So what is the other act -- if we  
2 can use it in terms of 404(B) language, what is the other  
3 act that the State thinks has been proven by clear and  
4 convincing evidence that should be admissible and what  
5 does that act intended to prove other than bad conduct on  
6 the part of the Defendant?

7 MR. BUTNER: It proves motivation because if  
8 the Court will recall that Miss Kennedy and Mr. DeMocker  
9 were still fighting about finances as evidenced by the  
10 e-mails, and her last words in the conversation with her  
11 mother shortly before her death, and so it demonstrates  
12 financial motivation in this case when she said, you know,  
13 we're still fighting over this distribution of money. He  
14 will paid this and so forth. We're going to go back to  
15 Court. I've got to talk to my lawyer.

16 THE COURT: They are not specifically fighting  
17 over the Book of Business, though, in fact, there's no  
18 reference in the final e-mails to the Book of Business.

19 MR. BUTNER: That's right. That's not  
20 specifically referenced in the final e-mails, Judge, but  
21 it's all dollars and sense, so to speak, there at the end.  
22 And as I was stating the only way that Mr. DeMocker  
23 prevailed was not by some sort of in Court on the merits  
24 determination but rather he simply wears her down.

25 She capitulated, she rolled over, basically,



1 and played dead, and settled. And in this particular case  
2 it clearly demonstrates motivation for this homicide  
3 because she was going to attempt to undo that or at least  
4 talk to her lawyer and go back to court.

5 THE COURT: Do you acknowledge any prejudice  
6 as far as unfair prejudice derived from the representation  
7 that this was falsely sworn or perjured evidence?

8 MR. BUTNER: Well, I think that I basically  
9 conceded that it would not be appropriate for Mr. Echols  
10 to say that the Defendant is going to get convicted of  
11 perjury for doing something like this but I don't see  
12 unfair prejudice that was it falsely sworn.

13 I think the evidence as analyzed by the CPA  
14 and the fraud examiner working for the State indicates  
15 that it truly was falsely sworn but that's not unfair  
16 prejudice. That's prejudice that tends to demonstrate the  
17 truth of the matter, so to speak, tends to demonstrate the  
18 motivation for the homicide in this case.

19 THE COURT: Thank you. We're about 10 to 5  
20 but, Mr. Sears, the next item.

21 MR. SEARS: Your Honor, could I get the last  
22 word on this particular --

23 THE COURT: Go ahead.

24 MR. SEARS: -- matter. Thank you. You struck  
25 the F(12) aggravator for which there was a theory that

1 Mr. DeMocker was afraid that somehow the fact that he had  
2 hoodwinked Carol Kennedy would be exposed and he killed  
3 her to prevent her from doing that. You have struck that.  
4 You found that they did not have probable cause to go  
5 forward on that theory.

6 This particular motion is aimed at whether the  
7 State should be allowed to say in their case in chief that  
8 he made a false and misleading statement in his divorce  
9 case and whether he hid assets.

10 It is impossible to imagine that the State  
11 could seriously contend that in a case where you heard  
12 constant evidence of back and forth, you know, you have a  
13 Book of Business. No, I don't. My lawyer, my accountant  
14 say I don't have a Book of Business. I know the facts of  
15 my own employment, that is never hiding everything. It is  
16 hiding in plain view. It is having a discussion about it  
17 and taking a position in opposition as people do in civil  
18 litigation including divorces every single day and, in  
19 fact, if people didn't take positions in opposition, of  
20 course, we wouldn't have litigation and we wouldn't need  
21 Judges and people wouldn't have lawyers because everybody  
22 would agree about every point.

23 You heard all of the good reasons from  
24 Mr. DeMocker, from Anna Young and from Craig Curry about  
25 why this is not a hard asset despite what Mr. Echols and

1 Mr. Casalena say why it was not included on the financial  
2 sheet because that's not where it goes. Mr. Curry, I  
3 don't think could have been much clearer in his  
4 explanation of intangible assets being income and they  
5 were reflected on the financial statements in the nature  
6 of what Mr. DeMocker's income. He derives his income from  
7 this asset which is his skill and expertise with his  
8 client in the case and the more skill and expertise with  
9 his clients he demonstrates the more income he receives.  
10 That's all it means in this case.

11 What Mr. Echols and Mr. Casalena stubbornly  
12 persisted in this was, oh, no, this is something that has  
13 a hard value because it's an asset because he can go and  
14 do something with it and get dollars in his pocket. What  
15 the State wants to argue and what the State has just  
16 argued is that Mr. DeMocker was a liar and a cheat and  
17 defrauded people and engaged in false swearing in his  
18 divorce case without any evidence whatsoever much less by  
19 clear and convincing standard that he did that.

20 All of the evidence is he talked about it. He  
21 was open about it. He disclosed it. He simply disagreed  
22 with the notion for very good reason. The State then says  
23 incorrectly that the dispute at the very end of Carol  
24 Kennedy's life was about this Book of Business.

25 When, in fact, Your Honor, I think we made

1 this point, after May 28th, 2008, there is not one single  
2 communication in writing by Carol Kennedy to Mr. DeMocker,  
3 her attorney, any one else about the Book of Business.  
4 That topic disappears from view on May 28th, 2008.

5 The discussion as the Court well knows having  
6 heard hours of testimony about it at the end of her life  
7 was simply about the overage on the division of the 401K  
8 and the back payments on the Chase Credit Card bill.  
9 That's what she was talking to her mother about, that's  
10 what she was talking to Mr. Fruge about, and most of all  
11 that's what she was talking to Steve DeMocker about, not  
12 about the Book of Business.

13 Those are two different concepts and to try  
14 and blur the distinction and say that, oh, it's all just  
15 about money, therefore, this information comes in as  
16 misleading, I think, to the Court. But most importantly  
17 it just demonstrates that there is no other purpose in the  
18 State's mind for this evidence beyond dirtying up Mr.  
19 DeMocker's impermissibly under 404(B).

20 THE COURT: 4 and 5 somewhat overlap. So if  
21 you want to address Number 5, I think I'll probably end  
22 with that one tonight.

23 MR. SEARS: Thank you, Your Honor. Number 5  
24 as I understand it does not an overlap. It's swallowed up  
25 by Number 4 because it's all really one course of conduct.

1 The reason that we broke them up -- remember, how this  
2 came about is we made a list of things that we were  
3 concerned about based on the disclosure and we thought  
4 until recently that the State was pursuing some other  
5 theory that in addition to these false and misleading  
6 statements about the Book of Business that they were still  
7 claiming, as Mr. Castalena widely did and as Mr. Echols  
8 wildly did, that Mr. DeMocker had some amount of money in  
9 an offshore bank account in a Swiss vault some place or  
10 something.

11 They've never produced -- as much as they've  
12 tried to do that, they have never shown as much as a penny  
13 unaccounted for and that all of the time, and we saw all  
14 of this stuff in the divorce where questions would be  
15 raised, requests would be made of Mr. DeMocker where's  
16 this, where's that, what did you with that.

17 Mr. DeMocker drops what he's doing and  
18 responds and attaches documents and says this is what I  
19 did. This is where the money went. Here's where every  
20 penny went. You just weren't looking in the right place.

21 So we broke these items out into two separate  
22 factors. One, believing that they must be talking about  
23 something else. They must be talking about something else  
24 but now I hear from Mr. Butner that it's all the same  
25 which is why I think that you're right in saying that 4

1 and 5 overlap. I think that they are just different ways  
2 to say the same thing.

3 THE COURT: Mr. Butner, are you -- you're not  
4 asking -- let me ask it open-ended. Are you talking  
5 about the same thing in 5 as 4 or it overlaps a bit still  
6 dealing with the Book of Business part of it?

7 MR. BUTNER: That's basically it, Judge. The  
8 court documents, the income tax returns, Mr. Echols'  
9 testimony about all of those things, that's, in essence,  
10 what's going on there.

11 THE COURT: All right. So in terms of what  
12 you want to get in front of the jury, in terms of other  
13 acts that they might be qualified as that, is the value of  
14 the Book of Business the fact of what would be gained or  
15 lost in terms of financial welfare by Mr. DeMocker visa  
16 vie Miss Kennedy depending on who got what out of the  
17 divorce action?

18 MR. BUTNER: That's correct.

19 THE COURT: And to the extent that 4 is  
20 talking about that is just in reference to the particular  
21 documents that were prepared for the Court apart from the  
22 final settlement but the financial documents that go along  
23 with the DR case, financial statements, and the like?

24 MR. BUTNER: That's correct, Judge.

25 THE COURT: Okay.

1 MR. BUTNER: You know, sort of a corollary to  
2 that is the last argument, so to speak, between the  
3 parties about how Mr. DeMocker was suppose to have made  
4 payments on the Chase Account and didn't and then the  
5 discussion that, well, those Chase payments were swallowed  
6 up in the final decree and then Miss Kennedy basically  
7 arguing back, well, I'm going to offset your failure to  
8 make those payments against what you are to be paid out of  
9 the distribution of the 401K.

10 THE COURT: I recognize that there's some  
11 overlap with those issues that were the last back and  
12 forth between the former spouses.

13 All right. Let me take a break at this point.  
14 We'll address the remaining issues on the 404(B) in the  
15 morning. I have another 8:15 tomorrow morning and we're  
16 schedule to started up again at 9 o'clock. So we'll  
17 recess until then.

18 (Whereupon, the proceedings were concluded.)  
19  
20  
21  
22  
23  
24  
25

## R E P O R T E R ' S   C E R T I F I C A T E

I, Lisa A. Chaney, a Certified Reporter, in the State of Arizona, do hereby certify that the foregoing pages 1 through 168 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 27th of January 2010.

A handwritten signature in cursive script, appearing to read 'Lisa A. Chaney', written in black ink.

LISA A. CHANEY, RPR, CSR, CR  
Certified Reporter  
Certificate No. 50801